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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 205

JOHN HARRY BRUNO,
Petitioner,

—v.—

PENNSYLVANIA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

PETITION FOR CERTIORARI FILED AUGUST 13, 1969
CERTIORARI GRANTED JUNE 1, 1970

IN THE

Supreme Court of the United States

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IN THE COURT OF OYER AND TERMINER AND GENERAL JAIL DELIVERY AND COURT OF QUARTER SESSIONS OF THE PEACE IN AND FOR MONTGOMERY COUNTY, PENNSYLVANIA

OF APRIL TERM, 1966, NO. 279

COMMONWEALTH

vs.

JOHN H. BRUNO

BEFORE:

CHARGE: #803, #804, #805, #806, #807 of 1966. Murder

808 of 1966. 1. Robbery

2. Robbery—Being Armed With an Offensive Weapon.

#809 of 1966. Burglary.

1966, June 1: APPLICATION TO SUPPRESS EVIDENCE, AND ORDER FILED Rule granted and hearing set for June 1, 1966 at 1:30 P.M. in Court Room "D:.

By the Court, David E. Groshens, Judge

1966, June 1: Commonwealth's Answer to Application to Suppress Evidence filed.

Hearing on Petition to Suppress Evidence held.

1966, June 1: Commonwealth Witnesses:

Charles G. Moody (s)
Wayne Koffel (s)
Robert Baxter (s)

Defense Witnesses:

Joseph Interrante (s)
Charles H. Jamison (s)
Vito J. Fusco (s)

Application to Suppress is dismissed.

By the Court, David E. Groshens, Judge

1966, June 2: Approved Indictments (7).

1966, June 7: Application to Quash Indictments filed.

ORDER:

AND NOW, the Rule is granted as prayed for in the foregoing Application and made returnable on the 17th day of June, 1966 at 9:00 A.M., in Court Room "D:, Court House, Norristown, Pennsylvania.

By the Court, E. Arnold Forrest, P. Judge.

1966, June 17: ORDER filed.

AND NOW, an Answer having been filed, the matter is ordered on the Argument Long List.

By the Court, E. Arnold Forrest, P. J.

1966, July 6: Certification from Court of Common Pleas filed r Opinion and Order Sur Defendant's Motion to Dismiss Petition for Appointment of Sanity Commission and the Commonwealth's Answer Thereto.

AND NOW, this 6th day of July, 1966, after oral argument before the Court en banc and consideration of the briefs filed, the defendant's motion to dismiss the petition

1966, July 6: for appointment of a sanity commission is dismissed; by separate order of even date herewith, the Court appoints a commission consisting of two qualified physicians and one attorney at law to proceed in accordance with the provisions of Sections 344 and 345 of the Mental Health Act of 1951, as amended; it is ORDERED and DIRECTED that the above captioned proceeding shall be certified over from the Court of Common Pleas to the Court of Oyer and terminer as of # 279 April Term, .1966, the pending criminal proceedings against the defendant.

By the Court, Robert W. Honeyman, Judge

1966, July 6: ORDER filed.

AND NOW, to wit, upon consideration of the foregoing petition, the Court directs that JOHN HARRY BRUNO be examined by Alvin H. Fisher, Jr., M.D., Harvey Bartle, Jr., M.D., and Arthur W. Bean, Esq., a commission who shall make a report of their examination in writing to the Court. And furthermore, the Clerk of the Court is directed to notify the persons whose names are endorsed on the petition of the time and place of the investigation.

By the Court, Robert W. Honeyman, Judge.

1966, July 7: Criminal Action Nos. 803, 804, 805, 807, 808, 809. (4 Petitions)
Preliminary Objections to Application for Bill of Particulars filed by the District Attorney.

1966, July 7: Petition for Supersedeas filed.

1966, July 11: Notice of Appeal and Acceptance of Service by Judge of the Court below filed.

1966, July 14: Notice of Appeal and Acceptance of Service by Appellee or his Counsel filed.

1966, July 15: Commonwealth's Answer to Petition for Supersedeas filed.

1966, July 15: ORDER SUR PETITION FOR SUPERSEDEAS AND COMMONWEALTH'S ANSWER THERETO filed.

AND NOW, upon consideration of the petition for supersedeas and the Commonwealth's Answer thereto, the defendant's petition for supersedeas to stay the order of this Court dated July 6, 1966, is refused.

By the Court, Robert W. Honeyman, Judge.

1966, July 15: CERTIORARI to the Court of Oyer and Terminer for the County of Montgomery filed. (Supreme Court # 67 January Term, 1967) (First Degree Murder-Appointment of Sanity Commision)

Returnable the third Monday of August, 1966.

1967, Jan. 19: Remittitur and Opinions of the Court dated January 4, 1967 filed from the Supreme Court.

AND it was so proceeded in our said Supreme Court, that the following judgment was made, to wit:

Appeal quashed without prejudice.

Mr. Justice Roberts files a dissenting opinion.

1967, Feb. 27: ORDER filed.

AND NOW, after argument, defendant's application to quash indictments is dismissed.

By the Court, David E. Groshens, P.J.

1967, Mar. 9: Copy of ORDER from Common Pleas Court filed.

1967, Mar. 9: AND NOW, it is ORDERED that the Sheriff of Montgomery County shall arrange to produce the defendant, John Harry Bruno, to appear before the Sanity Commission appointed by this Court, at 1:30 P.M., Wednesday, March 29, 1967, in the Judge's Conference Room, 5th Floor, Court House, Norristown, Pennsylvania, and also to produce him before the same Commission at 1:30 P.M. on April 17, 18 and 19, 1967, in Court Room "D", Court House, Norristown, Pennsylvania; at the conclusion of each of these hearing, the Sheriff is DIRECTED to return said John Harry Bruno to the Montgomery County Prison.

By the Court, Robert W. Honeyman, Judge.

1967, Mar. 27: Correspondence from Department of the Army signed by William M. Myers, Colonel, JAGC, Chief, Litigation Division, dated 23 March 1967, containing records of the Physical Evaluation Board Proceedings (in sealed envelope) received this date and turned over to the Honorable Robert W. Honeyman.

1967, Mar. 27: ORDER SUR PHYSICAL EVALUATION BOARD PROCEEDINGS OF DEPARTMENT OF DEFENSE, UNITED STATES GOVERNMENT filed.

AND NOW, the District Attorney having served a subpoena duces tecum over the seal of this Court to the Department of the Army, Office of the Judge Advocate General, United States Government, for the record of certain proceedings before the Physical Evaluation Board thereof pertaining to the above named defendant, John Harry Bruno; and Colonel William M. Myers, JAGC, Chief, Litigation Division of the Department of the Army having transmitted said record pursuant to the Subpoena duces tecum to the Clerk of the

1967, Mar. 27: Court of Quarter Sessions of Montgomery County, Pennsylvania, with a letter, copy of which is attached hereto; it is ORDERED and DECREED that this record be delivered to Arthur W. Bean, Esquire, Chairman of Sanity Commission appointed in the above captioned proceedings by Order of this Court dated July 6, 1966, to be held by him until the conclusion of the proceeding before said Commission, where upon it shall be returned to the Clerk of this Court for return to the Department of the Army; it is further ORDERED that the said Arthur W. Bean as Chairman of the said Sanity Commission shall make such rulings as he deems necessary concerning the materiality, relevancy and admissibility of an or all of the material contained in the record of the Physical Evaluation Board.

By the Court, Robert W. Honeyman, Judge

1967, June 8: REPORT OF COMMISSIONERS filed.

1967, June 12: ORDER SUR REPORT OF SANITY COMMISSION filed.

AND NOW, the report of the Sanity Commission previously appointed by Order of this Court dated July 6, 1966, having been filed, and the Court having reviewed said report, as well as the transcript of the proceedings before it, under the provisions of Section 345 of Article III of the Act of June 12, 1951, as amended (50 P.S. 1225), the Court hereby concludes that the defendant, John Harry Bruno, is mentally ill, is of criminal tendency, requires care in a mental hospital, does not have sufficient present ability to consult with his counsel with a reasonable degree of rational understanding, and does not have a rational and factual understanding of the proceedings flowing from the

1967, June 12: criminal charges lodged against him; in accordance with the privisions of said Act, the Clerk of Courts is DIRECTED to serve a copy of this Order on counsel for the defendant, Daniel L. Quinlan, Jr., Esquire, and upon the defendant's nearest relatives, Mr. and Mrs. Charles Bruno, 655 East Marshall Street, Norristown, Pa.; the entry of an Order of commitment to a state hospital for patients with criminal tendencies is deferred until June 28, 1967, in order that, in the interim, a request may be made by and, or on behalf of the defendant for a hearing before the Court, if the defendant, his counsel, or his nearest relatives wish an opportunity to be heard, all of which is in accordance with the aforesaid Act.

By the Court, Robert W. Honeyman, Judge

1967, June 27: Defendant's Exceptions to Sanity Commission Report and Judge Honeyman's Order dated June 12, 1967 filed.

1967, June 29: Commonwealth's Motion to Strike Defendant's Exceptions to Sanity Commission Report and Judge Honeyman's Order Dated June 12, 1967 filed.

AND NOW, the Commonwealth's Motion to Strike Defendant's Exceptions to Sanity Commission's Report and the June 12, 1967 Order of the Court is allowed and said exceptions are ordered stricken; inasmuch as no request has been made to the Court by or on behalf of the defendant for an opportunity to be heard as provided in the Order Sur Report of Sanity Commission dated June 12, 1967, the Court, by order of even date herewith, has ordered the defendant, John Harry Bruno, committed to the Farview State Hospital at Waymart, Pennsylvania.

By the Court, Robert W. Honeyman, Judge.

1967, June 30: ORDER FOR COMMITMENT filed.

AND NOW, to wit, upon consideration of the within report of the Sanity Commission, the Court finds that the above named JOHN HARRY BRUNO is mentally ill and that he is of criminal tendency.

Accordingly, the Court directs that the said JOHN HARRY BRUNO be committed to Farview State Hospital at Waymart, Pennsylvania, to be there detained and treated as a mentally ill or mentally defective person at the expense of Commonwealth of Pennsylvania persuant to the provisions of the Mental Health Act of 1951, as amended, 50 P.S. And it is further ordered that the County of Montgomery pay the costs of this proceeding including the expense of transportation to the institution.

By the Court, Robert W. Honeyman, Judge

1967, July 10: Certiorari to the Court of Oyer and Terminer for the County of Montgomery,

Returnable the first Monday of January, 1968.

Supreme Court # 75 January Term, 1968.

Patrick N. Bolsinger, Prothonotary.

1967, July 11: Pursuant to Rule 63, printed above, you are hereby notified that on July 6, 1967 an appeal was taken to the Supreme Court of Pennsylvania in the above entitled case at 75 Jan. Term, 1968 by John Harry Bruno, which will be listed for argument at the session commencing in Philadelphia on Jan. 2, 1968.

Daniel L. Quinlan, Jr.

Service of the foregoing notice is hereby accepted.

Robert W. Honeyman, Judge

1967, July 19: Petition to Fix Compensation of Commissioners

Order Sur Petition to Fix Compensation of Sanity Commission.

AND NOW, upon consideration of the within petition to fix compensation for members of a sanity commission appointed by this Court under Order dated July 6, 1966, and after conference with an approval of the President Judge of this Court, it is ORDERED that the County of Montgomery shall pay a fee of one thousand ($1,000.00) Dollars to Arthur W. Bean, Esquire, 522 Swede Street, Norristown, Pennsylvania, 19401; and a fee of Five Hundred ($500.00) Dollars to Harvey Bartle, Jr., M.D., 864 County Line Road, Byrn Mawr, Pennsylvania, 19010; and a fee of Five Hundred ($500.00) Dollars to Alvin H. Fisher, Jr., M.D., Medical Office Building, Suite 201, 1245 Highland Avenue Abington, Pennsylvania, 19001.

By the Court, Robert W. Honeyman, Judge.

Certified from the Records of said Court at Norristown, this 4 day of Nov. A.D. 1966

/s/ Virginia E. Aker
Clerk of Courts

DOCKETED 5-13-66
Compared
INDEXED 5-13-66
Compared

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
OFFICE OF THE COMMISSIONER OF MENTAL HEALTH

MAY 13 10 22 AM '66
OFFICE OF COUNTY PROTHONOTARY MONT'G. CO. PA.

IN THE COURT OF COMMON PLEAS OF MONTGOMERY

COMMONWEALTH
vs.

JOHN HARRY BRUNO
(A Prisoner or Person Released on Bail Alleged to be Mentally Ill or Defective)

TERM, 19__
NO. 66- 5698

PETITION FOR COMMITMENT TO A MENTAL INSTITUTION OF PRISONER OR PERSON RELEASED ON BAIL

In accordance (with Sections 344 and 345, Mental Health Act, 1951, as amended)

TO THE HONORABLE THE JUDGES OF THE SAID COURT:

THE PETITION OF RICHARD S. LOWE, District Att'y RESPECTFULLY PRESENTS:

1. THAT HE IS THE District Attorney of Montgomery County
(Counsel for the prisoner, Superintendant, Warden; Jail Physician, Executive Officer of Institution or a responsible person)

OF Montgomery County, Pennsylvania

2. THAT JOHN HARRY BRUNO

[X] A PRISONER IN MONTGOMERY COUNTY PRISON INSTITUTION

[ ] HAVING BEEN CHARGED AND RELEASED ON BAIL

WAS CHARGED OR CONVICTED OF THE FOLLOWING HOMICIDE (5), BURGLARY, LARCENY
(Specify charges or the crime for which convicted)
AND RECEIVING STOLEN GOODS (2), ROBBERY (2), AND VIOLATION OF THE UNIFORM FIREARMS ACT.

3. THAT YOUR PETITIONER BELIEVES AND THEREFORE AVERS THAT THE SAID DEFENDANT IS IN SUCH CONDITION AS TO MAKE IT NECESSARY THAT HE BE CARED FOR IN A MENTAL INSTITUTION.

MH 45 - 5-64

HISTORY OF THE PATIENT

PATIENT'S FULL NAME: John Harry Bruno

RELIGION:

SOCIAL SECURITY NO.: 211-32-6684

SEX: [X] MALE [ ] FEMALE

COLOR: [X] WHITE [ ] NEGRO [ ] OTHER

MARITAL STATUS: [X] SINGLE [ ] MARRIED [ ] WIDOWED [ ] DIVORCED [ ] SEP.

AGE: 28

BIRTHDATE: Sept. 19, 1937

PLACE OF BIRTH: Norristown, Pennsylvania

IS PATIENT CITIZEN: [X] YES [ ] NO

IF FOREIGN, HOW LONG IN U.S.:

IS PATIENT LEGAL RESIDENT OF PENNA.: [X] YES [ ] NO

IF YES, HOW LONG: 28 yrs.

IF RESIDENT, GIVE CITY OR TOWN AND COUNTY: Norristown, Montgomery Co., Pa.

IF PATIENT IS NOT RESIDENT OF PENNA. - GIVE LEGAL RESIDENCE:

NAME OF FATHER: Charles Bruno

BIRTHPLACE: Italy

LEGAL RESIDENCE IF LIVING: 655 E. Marshall St. Norristown, Pa.

NAME OF MOTHER: Agnes Bruno (diBerto or doBerto)

BIRTHPLACE: Italy

LEGAL RESIDENCE IF LIVING: 655 E. Marshall St. Norristown, Pa.

HAS PATIENT SERVED IN ARMED FORCES: [X] YES [ ] NO

BRANCH: Co.B 2dBg 12th Inf.Ft.Riley

IF SO, GIVE SERIAL NO.: US # 52 518 876

HAS PATIENT HAD MENTALLY ILL RELATIVES: [X] YES [ ] NO

IF YES, STATE RELATIONSHIP AND WHETHER PATERNAL OR MATERNAL: Mother (maternal)

IF RELATIVES WERE EVER IN MENTAL HOSPITALS, STATE RELATIONSHIP AND GIVE NAME AND LOCATION OF INSTITUTION:
Mother - Norristown State Hospital - 2 yrs. (1951)

NUMBER OF PREVIOUS ATTACKS OF MENTAL DISORDER: Unknown

INSTITUTION OR INSTITUTIONS WHERE CARED FOR IN PREVIOUS ATTACKS:
Jan. 5, 1961 - Committed to Fitzsimons Gen. Hosp., U.S.Army Denver 30, Colo.

WHEREFORE your petitioner prays the court to order an inquiry into the defendants condition either by two qualified physicians or by a commission pursuant to Section 345 of the Mental Health Act of 1951 as amended.

And he will ever pray, etc.

AFFIDAVIT

(This affidavit must be sworn to or affirmed before a person authorized to administer an oath in the Commonwealth)

COMMONWEALTH OF PENNSYLVANIA ss:

COUNTY OF MONTGOMERY

RICHARD S. LOWE, Dist. Att'y. being duly sworn according to law does depose and says that the facts set forth in the above petition are true to the best of his knowledge and belief.

Richard S. Lowe
(Signature of Petitioner)
Richard S. Lowe

Sworn and subscribed before me this 13th day of May A.D. 1966

Eloise G. Devere
(Signature of Person Administering Oath)
Notary Public, Norristown, Montgomery Co.
My Commission Expires October 31, 1966

MH 45

12.

IN THE COURT OF COMMON PLEAS
OF MONTGOMERY COUNTY, PENNSYLVANIA

No. 66-5698

COMMONWEALTH

vs.

JOHN BRUNO

MOTION TO DISMISS PETITION FOR APPOINTMENT OF A SANITY COMMISSION

JOHN BRUNO, by his attorney, DANIEL L. QUINLAN, JR., ESQUIRE, files this Motion to the District Attorney's Petition for the Appointment of a Sanity Commission to examine JOHN BRUNO, and respectfully represents as follows:

1. That JOHN BRUNO has been charged by the District Attorney of having committed five (5) murders.

2. That JOHN BRUNO has been detained without bail in the Montgomery County Prison since April 26, 1966.

3. That as of this date, JOHN BRUNO has not been indicted and, therefore, the District Attorney's Petition is obviously premature.

4. That the Court of Common Pleas does not have jurisdiction under Section 344 of the Mental Health Act, as amended in 1956 and 1957.

5. That the prosecuting District Attorney is not entitled to initiate the Petition for the Appointment of a Sanity Commission to examine JOHN BRUNO.

6. That the decisional law to date construing Sections 344 and 345 of the Mental Health Act of June 12, 1951, P.L. 533 (50 P.S. § 1224 et seq.), as amended, involved instances where the defendant or his counsel and/or relatives initiated the Petition and/or they acquiesced in the same.

7. That JOHN BRUNO is protected from the interrogation of a Sanity Commission by reason of the Fifth (5th) and Fourteenth (14th) Amendments to the Fed-

eral Constitution and Section Nine (9) of Article One (1) of the State Constitution.

8. That the Constitutional immunity from self-incrimination does apply in this instance since the proposed examination contemplates the oral interrogation of JOHN BRUNO. *Commonwealth* v. *Butler*, 405 Pa. 36, 44-45 (1961); *Commonwealth* v. *Kravitz*, 400 Pa. 198, 219 (1960); *Commonwealth* v. *Musto*, 348 Pa. 300, 306-307 (1944).

9. That the prohibition of compelling a person to be a witness against himself is a specific prohibition against the use of physical or moral compulsion to extort communications from him. *Commonwealth* v. *Aljoe*, 420 Pa. 198, 202-204 (1966); *Commonwealth* v. *Tanchyn*, 200 Superior Ct. 148, 159 (1963).

WHEREFORE, this Honorable Court is requested to dismiss the Petition for the appointment of a Sanity Commission to examine JOHN BRUNO.

DANIEL L. QUINLAN, JR.
Attorney for Defendant

IN THE COURT OF COMMON PLEAS
OF MONTGOMERY COUNTY, PENNSYLVANIA

No. 66-5698

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN BRUNO

COMMONWEALTH'S ANSWER TO MOTION TO DISMISS PETITION FOR APPOINTMENT OF A SANITY COMMISSION

TO THE HONORABLE, THE JUDGES OF SAID COURT:

The Commonwealth by and through Richard S. Lowe, District Attorney of Montgomery County makes the following Answer:

1. Admitted.
2. Admitted.
3. Denied. The Commonwealth concedes that the defendant has not as yet been indicted, but denies that the Petition for Appointment of a Sanity Commission is premature. It is sufficient that the defendant is detained in a penal or correctional institution and is thought to be mentally ill or in such condition as to require care in a mental hospital or is thought to be a mental defective.
4. The Commonwealth admits and concedes that there may be some question as to the appropriate Montgomery County Court, and it may be that the petition should have been lodged in the Criminal Courts of Montgomery County. If it is found that the petition was lodged in an inappropriate forum, the Commonwealth requests your Honorable Court to direct that the matter be indexed in the proper court so as to avoid the vain act of re-filing.
5. Denied. Section 344 of the Mental Health Act provides that the application for appointment of a sanity commission may be filed by certain enumerated parties, "or by any responsible person", and the District Attor-

ney contends that he is contemplated within that provision.

6. The Commonwealth is without knowledge of the truth or falsity of this averment but even if it were assumed, arguendo, that the allegation were true, it would not foreclose the instant proceedings.

7. The privilege against self-incrimination provided for in the Fifth and Fourteenth Amendments to the Federal Constitution and likewise in the Constitution of the Commonwealth of Pennsylvania, is clearly irrelevant to the operation of a sanity commission. Such a commission is outside the privilege against self-incrimination, subject to certain reasonable restrictions imposed by the Court.

8. Denied. As stated in the next preceding paragraph the privilege against self-incrimination does not have application to the function of a sanity commission.

9. This is a conclusion of law which has no relevancy to the instant matter, and need not be answered

WHEREFORE, the District Attorney requests your Honorable Court to dismiss the defendant's motion to dismiss the petition for appointment of a sanity commission.

Respectfully submitted,

/s/ Richard S. Lowe
RICHARD S. LOWE
District Attorney

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

66-5698

COMMONWEALTH OF PENNSYLVANIA

vs.

JOHN HARRY BRUNO

OPINION AND ORDER SUR DEFENDANT'S MOTION TO DISMISS PETITION FOR APPOINTMENT OF SANITY COMMISSION AND THE COMMONWEALTH'S ANSWER THERETO

HONEYMAN, J.

The defendant, John Harry Bruno, was arrested on April 27, 1966 on charges of homicide, burglary, larceny, robbery, and violation of the Uniform Firearms Act. After preliminary hearing before Justice of the Peace Charles H. Jamison on May 4, 1966, he was held for Court without bail and was committed to the Montgomery County Prison. On May 13, 1966, Richard S. Lowe, Esquire, District Attorney of Montgomery County, filed a petition for the defendant's commitment to a mental institution under Sections 344 and 345, Mental Health Act of 1951, as amended [50 P.S. 1224, 1225]. In said petition, the District Attorney alleged that the defendant was in such condition as to make it necessary that he be cared for at a mental institution and recited certain personal facts about the defendant in support thereof. The prayer of his petition was that the Court either appoint two qualified physicians or a Commission to inquire into the defendant's mental condition. On May 16, 1966, Daniel L. Quinlan, Jr., Esquire, counsel for the defendant, John Harry Bruno filed a motion to dismiss the said petition, and on May 20, 1966, the District Attorney filed an answer thereto on behalf of the Commonwealth of Pennsylvania in which he prayed that the motion to dismiss be, in turn, dismissed. Subsequent to all of the foregoing, viz. June 2, 1966, the Grand Jury

for the June 1966 Term of Court returned the several bills of indictment as "approved" including five bills of indictment charging the defendant with murder, two of said murders allegedly having been committed by the defendant on October 20, 1961; one on December 21, 1963; and the remaining two on April 23, 1966.

In the defendant's motion to dismiss the District Attorney's petition he alleges:

1. The petition is filed prematurely.
2. The Court of Common Pleas does not have jurisdiction under Sections 344 and 345 of the Mental Health Act of 1951, as amended.
3. That the District Attorney has no power or right to file the said petition.
4. That the appointment of a sanity commission as well as the inquiry that such commission would make following their appointment would violate the defendant's constitutionally protected immunity from self-incrimination.

The District Attorney's answer denies that the filing of the petition was premature; admits that his petition was erroneously filed in the Court of Common Pleas instead of the Criminal Courts of Montgomery County; avers that he is a proper party to initiate such petition; and further avers that the provisions of the Mental Health Act for such a sanity commission to be appointed to examine and inquire into the mental condition of a defendant is not prohibited by either the Constitution of the Commonwealth of Pennsylvania or the Constitution of the United States, but acknowledges that reasonable and proper restrictions upon the functions and actions of such sanity commission may be imposed by the Court. We will dispose of each of the contentions of the defendant in turn.

There is nothing in either the statutory or decisional law to support the defendant's contention that the District Attorney's petition was prematurely filed. Section 344, Article III, of the Mental Health Act of 1951, as amended specifies that such petition for commitment may be filed for (1) any person detained in any penal or correctional institution who is thought to be mentally ill

or in such condition that he requires care in a mental hospital, or who is thought to be a mental defective; or (2) for any person charged with a crime and released on bail pending trial who is thought to be mentally ill or a mental defective; or (3) for any person whose penalty for crime has been fixed at death by a Court or jury, when it appears that such person is insane and such insanity shall have occurred since the penalty was fixed or sentence imposed. Obviously, the petition may be filed before, during or after trial. In situations of this nature, the United States Supreme Court has stated that it is far more desirable to inquire into the mental capacity and condition of a defendant [particularly one charged with murder] before trial, rather than attempt to determine his mental capacity or condition at some later date subsequent to trial. In *Dusky* v. *United States*, 362 U.S. 402 [1960] by per curiam opinion the Court remanded the record of that proceeding for a new hearing to ascertain the defendant's competency to stand trial and ordered a new trial in the event that the defendant was found competent. The Court said at page 403:

> "In view of the doubts and ambiguities regarding the legal significance of the psychiatric testimony in this case and the resulting difficulties of retrospectively determining the petitioner's competency as of more than a year ago, we reverse the judgment of the Court of Appeals affirming the judgment of conviction, and remand the case to the District Court for a new hearing to ascertain petitioner's present competency to stand trial, and for a new trial if petitioner is found competent."

In the most recent case from the United States Supreme Court on the subject, viz., *Pate* v. *Robinson*, October Term, 1965, No. 382, with Opinion dated March 7, 1966, 34 LW 4185, the Court said at page 4188:

> "We believe that the evidence introduced on Robinson's behalf entitled him to a hearing on this issue. The court's failure to make such inquiry thus deprived Robinson of his constitutional right to a fair

> trial. See Thomas v. Cunningham, 313 F. 2d 934 (C. A. 4th Cir. 1968). Illinois jealously guards this right. Where the evidence raises a 'bonafide doubt' as to defendant's competence to stand trial, the judge on his own motion must impanel a jury and conduct a sanity hearing pursuant to Ill. Rev. Stat., c.38, § 104-2 (1963). . . ." [emphasis included]

It appears manifestly clear that the present stage of the proceedings is the most appropriate time for us to proceed to inquire into the mental capacity of the defendant applying the test laid down in *Dusky* v. *United States*, supra, wherein the court delineated such test as being, at page 402:

> ". . . the 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him'."

as well as generally inquiring into the allegations of the petition that the defendant ". . . is in such condition as to make it necessary that he be cared for in a mental institution.". The defendant's counsel also contended that the petition was prematurely filed because the defendant had not been, as of the date of filing, indicted by the Grand Jury. We fail to see how this was of any moment, but, if it were, it has now become moot by reason of the fact that he was subsequently indicted under the several bills drawn by the District Attorney and submitted to the Grand Jury.

The District Attorney readily acknowledges that he erroneously filed his petition in the Court of Common Pleas of this County. Section 102, Art. I, of the Mental Health Act of 1951, as amended [50 P.S. 1072], contains certain definitions including the following:

> "(2) 'Court' shall mean the court of common pleas or other court of record having jurisdiction, or law judge thereof, of the county in which the patient is or resides."

We agree with counsel for the defendant that the petition should have been filed in the criminal courts of this County, but we can see no harm or prejudice to the defendant in allowing the matter to be transferred from the former to the latter courts. Therefore, in our Order we will so direct.

The defendant's counsel contends that the District Attorney has no authority or right to file this petition under sections 344 and 345 of the Mental Health Act of 1951, as amended. Under the law prior to that Act, there may well have been a question about this although neither counsel nor the Court have found any decisions specifically so holding. All of the cases cited by the defendant's brief involved the interpretation of earlier Acts of Assembly which were completely andexpressly repealed and superseded by the Mental Health Act of 1951. The Act of May 14, 1874, P.L. 160, stated, inter alia, ". . . applications may be made to the court by the warden, superintendent, physician or any inspector of the penitentiary or prison in which said person is imprisoned, or by the general act of the Board of Public Charities, . . .". This Act was repealed by the Act of July 11, 1923, P.L. 998, Art. III, Section 308, and that Act stated, inter alia, ". . . the said superintendent, jail physician, warden, or other chief responsible officer of the institution, or other person, shall immediately make application, . . .". The Supreme Court of Pennsylvania in the case of *Commonwealth* v. *Barnes*, 280 Pa. 351 [1924] interpreted this language to be limited to persons connected with the penal institution in which the defendant was incarcerated or, at least, a person who was in some measure responsible for his care. In doing so, the Court applied the ejusdem generis rule to the phrase ". . . or other chief responsible officer of the institution, or other person . . .". Several lower courts of the Commonwealth before the passage of the Mental Health Act of 1951 have reached a similar conclusion. The Mental Health Act of 1951, supra, specifically repealed and superseded the Act of 1923. Sub-section (b) of Section 344 of the 1951 Act states as follows:

> "(b) The application shall be in writing on a form prescribed by the department. It may be made by

> counsel for the prisoner or the superintendent, warden, jail physician, or other executive officer of the institution in which the person sought to be committed is detained, or by any responsible person, *whether or not he is connected with such institution.*" [50 P.S. 1224] [emphasis supplied]

In *Commonwealth* v. *Moon*, 383 Pa. 18 [1955], the Supreme Court of Pennsylvania said at page 27:

> ". . . It is a canon of statutory construction that where words of a later statute differ from those of a previous one on the same subject, they presumably are intended to have a different construction: . . ."

Certainly this principle should have applicability herein. Presumably the late Judge Sohn of the Court of Oyer and Terminer of Beaver County applied this principle in the case of *Commonwealth* v. *Cook*, 19 Beaver Co. L.J. 4 [1957], in which case he appointed a sanity commission for the defendant therein under Section 34 of the Mental Health Act of 1951 on the petition of the District Attorney of Beaver County. Judge Sohn in his opinion did not specifically discuss the propriety of the action of the District Attorney in filing such a petition, but by reason of his acting favorably upon it, he obviously gave tacit approval thereto. The research of counsel for the defendant, the District Attorney and the Court has failed to disclose any other decisions on the question since the enactment of the Mental Health Act of 1951. We can only conclude that the Legislature intended that such petitions for commitment of prisoners be extended to include persons in addition to those contemplated by the Acts of 1874 and 1923 (supra). This extension of authority expressly included counsel for the defendant, and we see no logical reason why the District Attorney of this County does not fall squarely into those persons contemplated by the Legislature when they said ". . . or by any responsible person, whether or not he is connected with such institution". The District Attorney is a quasi-judicial officer and is certainly a "responsible" person. By the clear and express language of the Statute, he need not be connected with the penal institution in which the defendant is in-

carcerated. He is expressly and directly charged with the responsibility of disposing of the criminal charges lodged against the defendant by the several bills of indictment which were approved by the Grand Jury. Certainly, if he, under oath, represents to this Court that he believes that the defendant is mentally ill and that he lacks the capacity to stand trial by the above cited test of the United States Supreme Court in *Dusky* v. *U.S.*, supra, we see no reason why such petition should not be entertained and acted upon by the court. Counsel for the defendant, by anguished rhetoric and vituperative denunciations of the District Attorney, contends that this action by the District Attorney is simply to avoid the necessity of proceeding with the prosecution. We find nothing in the record of this case to substantiate such accusation. Counsel for the defendant presupposes that the sanity commission will conclude that John Harry Bruno is mentally incompetent or insane. He overlooks the possibility that such commission could conclude otherwise, and is also obviously unmindful of the specified procedures in Section 345 of the Mental Health Act of 1951, which will safeguard the defendant from being unnecessarily or illegally transferred to a mental institution. We hold that the District Attorney is a proper person to file a petition for the commitment of the defendant under Section 344 and 345 of the Mental Health Act of 1951, as amended.

Finally, the counsel for the defendant contends that the appointment of a sanity commission for the defendant, and the ensuing inquiry by it, will violate the defendant's constitutionally protected immunity against self-incrimination. Former Chief Justice Horace Stern of the Supreme Court of Pennsylvania in the case of *Commonwealth* v. *Musto*, 348 Pa., 300 [1944] specifically decided this point in his opinion therein for a unanimous Court. At pages 305-7, he stated:

> "Realizing that an attempt would be made to prove defendant insane at the time of the murder, the district attorney obtained permission from the court to have alienists examine him in prison. His counsel found fault with this proceeding on the ground that

it constituted a violation of defendant's constitutional right not to be compelled to give evidence against himself. While the exact question thus presented has apparently not been ruled upon by either of our appellate courts, it has arisen in many other jurisdictions, and these have quite uniformly held that the constitutional immunity from self-incrimination does not apply to a compulsory examination to determine the prisoner's physical or mental condition for the purpose of testifying in regard thereto, provided, of course, that he be not compelled to answer any questions propounded to him by those making the examination. The purpose of the constitutional provision is to prohibit the compulsory oral examination of the prisoner either before or at trial,—to prevent his being required to incriminate himself by speech or the equivalent of speech: Commonwealth v. Valeroso, 273, Pa. 213, 219, 220, 116 A. 828, 830. 'The prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material': per Mr. Justice Holmes in Holt v. United States, 218 U.S. 245, 252, 253. 'Not compulsion alone is the component idea of the privilege, but testimonial compulsion. . . Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one': 8 Wigmore on Evidence (3d ed.) 375, Sec. 2265. . . ."

Therefore, it seems manifestly clear that the sanity commission may be appointed, and may proceed with its appointed task, viz. to determine whether or not John Harry Bruno is mentally ill or in such condition that he requires care in a mental hospital, or is a mental defective, as well as determining whether or not he has the mental capacity to stand trial, including a sufficiently present ability to consult with his counsel with a reasonable degree of rational understanding as well as having a ra-

tional and factual understanding of the proceedings flowing from the criminal charges lodged against him. However, the sanity commission may not and cannot compel him to answer any questions propounded to him by such commission. Also, at all times in connection with such proceeding, counsel for the defendant has a right to be present. Therefore, we conclude that the appointment and the functioning of the proposed sanity commission for John Harry Bruno will not invade any of his constitutionally protected rights or privileges.

ORDER

AND NOW, this 6th day of July, 1966, after oral argument before the Court en banc and consideration of the briefs filed, the defendant's motion to dismiss the petition for appointment of a sanity commission is dismissed; by separate order of even date herewith, the court appoints a commission consisting of two qualified physicians and one attorney at law to proceed in accordance with the provisions of Sections 344 and 345 of the Mental Health Act of 1951, as amended; it is ORDERED and DIRECTED that the above captioned proceeding shall be certified over from the Court of Common Pleas to the Court of Oyer and Terminer as of #279, April Term, 1966, the pending criminal proceedings against the defendant.

BY THE COURT,

/s/ Robert W. Honeyman
J.

Court en banc:
E. Arnold Forrest, P.J.
Robert W. Honeyman
Frederick B. Smillie, J.

Simillie, J., dissents.

No. ..... Term, 19....

COMMONWEALTH

vs.

Petition for Commitment of a Prisoner or Person Released on Bail to a Mental Hospital or Institution and Order.

MH 45

ORDER

(In Accordance With Section 345, Mental Health Act, 1951, as Amended.)

And now, to wit, this 6th day of July, 1966 upon consideration of the foregoing petition, the court directs that JOHN HARRY BRUNO be examined by Alvin H. Fisher, Jr., M.D., Physician, Harvey Bartle, Jr., M.D., Physician, and Arthur W. Bean, Esq., Attorney at Law

☐ Two qualified physicians ☒ A commission

who shall make a report of their examination in writing to the Court. And furthermore the clerk of the court is directed to notify the persons whose names are endorsed on the petition of the time and place of the investigation.

/s/ Robert W. Honeyman
Signature of Judge

NOTE: Within ten (10) days of the receipt of this application, the clerk of court shall cause to be served written notice of the filing of the application on the prisoner's counsel, if he has any, and on his nearest available relative, or in the absence of such, his nearest available friend, and shall endorse on the application the names of those notified—Section 345(A), Mental Health Act of 1951.

Use this space for Endorsements

[382]

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 67 January Term, 1967

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN HARRY BRUNO, APPELLANT

Appeal from the Order of the Court of Oyer and Terminer and General Jail Delivery in and for Montgomery County, as of April Term, 1966, No. 279

OPINION OF THE COURT

BELL, C. J. Filed: January 4, 1967

This is an appeal from the Order of the Court of Oyer and Terminer and General Jail Delivery appointing a sanity commission for defendant.

On April 26, 1966, the defendant, John Harry Bruno, was arrested on several charges, including the commission of five homicides. He was arraigned on April 27, 1966, and given a preliminary hearing before a Justice of the Peace on May 4, 1966. At the preliminary hearing defendant was held without bail for the action of the Grand Jury.

The District Attorney, on May 13, 1966, filed a petition for defendant's commitment to a mental institution.* This petition was filed under Sections 344 and 345 of the Mental Health Act (Act of June 12, 1951, P.L. 533, Article III, Sections 344-345 as amended, 12 P.S. Sections 1224 (Supp.)-1225).

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*In the judgment of the writer of this Opinion, the petition of the District Attorney was in the interest of fairness, mercy and Justice for the accused.

On May 13, 1966, defendant's attorney filed a motion to dismiss the petition; the District Attorney filed an answer praying that defendant's motion be dismissed. In the meantime, the Grand Jury on June 2, 1966 indicted defendant on five bills of indictment, each of which charged defendant with murder. On July 6, 1966, the Court of Oyer and Terminer (1) dismissed defendant's motion to dismiss the Commonwealth's petition for ap-
[382-2]
pointment of a sanity commission and (2) appointed a sanity commission. From this Order, defendant filed this appeal to this Court.

The appeal must be quashed because it is an appeal from an interlocutory Order. In *Commonwealth* v. *Byrd*, 421 Pa. 513, 219 A.2d 590, the Court said (page 517):

". . . Defendant admits that ordinarily no appeal would lie from an order granting a neuro-psychiatric examination prior to trial, or before final judgment has been entered, since such orders are generally interlocutory and unappealable. However, he contends that while this Order is interlocutory, it is an appealable Order because it falls within the 'exceptional circumstances' doctrine enunciated in Commonwealth v. Kilgallen, 379 Pa. 315, 320, 108 A. 2d 780, which permits appeals (1) in cases where basic human rights or (2) public interest of great importance are involved, or (3) to prevent a great injustice to a defendant. . . ."

The Order appealed from is interlocutory; at this stage it is not final, it is not prejudicial to the defendant and it does not fall within 'the exceptional circumstances doctrine,' and therefore the appeal must be quashed. *Commonwealth* v. *Novak*, 384 Pa. 237, 120 A. 2d 543; Cf. also *Commonwealth ex rel. Fisher* v. *Stitzel*, 418 Pa. 356, 211 A. 2d 457; *Commonwealth ex rel. Tabb* v. *Youth S. C. Super.*, 407 Pa. 466, 183 A. 2d 317; *Commonwealth ex rel. Nichols* v. *Lederer*, 193 Pa. Superior Ct. 482, 485-490, 165 A. 2d 711, affirmed 404 Pa. 218, 172 A. 2d 319.

Appeal quashed, without prejudice.

Mr. Justice ROBERTS files a dissenting Opinion.

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IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

No. 67 January Term, 1967

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN HARRY BRUNO, APPELLANT

Appeal from the Order of the Court of Oyer and Terminer and General Jail Delivery in and for Montgomery County, as of April Term, 1966, No. 279

DISSENTING OPINION

ROBERTS, J. Filed: January 4, 1967

I dissent from the Court's action in this case. Cf. *Commonwealth* v. *Byrd*, 421 Pa. 513, 519, 219 A.2d 293, 296 (1966) (dissenting opinion). In my view a more appropriate disposition would be to remand this matter to the court below with leave to the parties to proceed under the new and now controlling Mental Health and Mental Retardation Act of 1966.* Such a remand would, of course, imply no view as to whether application of the new act to the defendant would violate his right to a speedy trial or any other constitutional guarantee.

* Effective, January 1, 1967.

IN THE COURT OF QUARTER SESSIONS OF
MONTGOMERY COUNTY, PENNSYLVANIA

No. 279

APRIL TERM, 1966

COMMONWEALTH OF PENNSYLVANIA

vs.

JOHN HARRY BRUNO

APPLICATION TO SUPPRESS EVIDENCE

The defendant, John Harry Bruno, by his attorney, DANIEL L. QUINLAN, JR., ESQUIRE, respectfully moves this Honorable Court to direct the District Attorney to show cause, if any he has, why the "statement" allegedly signed by the defendant on or about April 27, 1966, together with the "1-22 Cal. J.C. Higgins snub nose revolver" should not be suppressed as evidence and excluded from the Commonwealth's presentment of evidence to the Grand Jury on June 2, 1966, for the reasons that the defendant had been denied his Constitutional rights during the period preceding the execution of the "statement", i.e., April 26th-27th, and for the additional reason that the "revolver", as aforesaid, was seized as a result of the issuance of a second warrant on April 27th, the "probable cause", if any, for the issuance of the latter having been based on information illegally elicited.

/s/
DANIEL L. QUINLAN, JR.

ORDER

Rule granted and hearing set for June 1, 1966 at 1:30 P.M. in Court Room "D".

BY THE COURT:

/s/
DAVID E. GROSHENS, J.

IN THE CRIMINAL COURTS OF
MONTGOMERY COUNTY, PENNSYLVANIA

No. 279

APRIL TERM, 1966

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN HARRY BRUNO

COMMONWEALTH'S ANSWER TO
APPLICATION TO SUPPRESS EVIDENCE

TO THE HONORABLE, THE JUDGES OF SAID COURTS:

The Commonwealth of Pennsylvania by and through Richard S. Lowe, District Attorney of Montgomery County hereby respectfully answers the Application to Suppress Evidence submitted to your Honorable Court on June 1, 1966, as follows:

The Commonwealth avers that the .22 calibre, nine-shot J. C. Higgins snub nose revolver should not be suppressed as evidence and excluded from the Commonwealth's presentment of evidence to the Grand Jury scheduled June 2, 1966, nor should the "statement" taken from the defendant on April 27, 1966 be excluded for the reasons that the revolver was obtained under and by virtue of a valid search warrant issued upon complaint setting forth reasonable and probable cause by a justice of the peace of competent jurisdiction; that the said search warrant was predicated upon the belief and the competent judgment of the investigating police personnel that the weapon used in the murders of Ottavio Perricone and Pauline Perricone, his wife, was a .22 calibre weapon; that the intensive police investigation conducted from the date of the discovery of the homicides in the late afternoon of Sunday, April 24, 1966 through Wednesday afternoon, April 27, 1966, was investigatory as that word is couched and used by the Supreme Court of the United States in *Esco-*

bedo v. *State of Illinois;* that the probable cause for the issuance of a warrant was not predicated upon anything the defendant said while in police custody on April 26th or up until the time of the recovery of the weapon on April 27th because the defendant made no incriminating or inculpatory statements of any sort or variety; that the Commonwealth of Pennsylvania by and through interrogating police officials, previous to the taking of the statement from the defendant on April 27th, admonished the defendant of his right to counsel, of his right to remain silent, and further informed him that anything he said could or would be used against him, and that in spite of these warnings and admonitions of these Constitutional rights and guarantees the defendant nevertheless persisted in his willing, agreeable, and voluntary desire to unburden his conscience by freely, openly, and without duress, coercion, offer of reward, or any other illegal or improper means gave first an oral and then a written statement. The Commonwealth emphatically and categorically denies that the second search warrant issued on the morning of April 27, 1966, and preceding the hour when the defendant was removed from the Montgomery County Prison on that date, was based on information illegally elicited.

This Answer is filed pursuant to Pennsylvania Rules of Criminal Procedure Nos. 323, 324, and 2001.

RESPECTFULLY SUBMITTED,

/s/ Richard S. Lowe
RICHARD S. LOWE
District Attorney

IN THE COURT OF OYER AND TERMINER AND GENERAL JAIL DELIVERY OF THE COURT OF QUARTER SESSIONS IN AND FOR THE COUNTY OF MONTGOMERY, PENNSYLVANIA

No. 279

APRIL TERM, 1966

COMMONWEALTH OF PENNSYLVANIA

vs.

JOHN HARRY BRUNO

APPLICATION TO QUASH INDICTMENTS

The defendant, John Harry Bruno, by his attorney, DANIEL L. QUINLAN, JR., ESQUIRE, respectfully moves this Honorable Court to direct the District Attorney to show cause, if any he has, why the "indictments" should not be quashed pursuant to Penna. R. Crim. Pro. 304 for the following reasons:

1. The defendant's "statement" of April 27, 1966 was presented to the Grand Jury in clear violation of the prohibition set forth by the Supreme Court of the United States. *Escobedo* v. *Illinois*, 378 U.S. 478 (decided June 22, 1964).

2. The "22 Cal. J.C. Higgins snub-nose revolver" "presented to the Grand Jury" was seized as a result of information illegally elicited from the defendant during the interrogation while defendant was detained incommunicado and, therefore, such evidence was inadmissible. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920). See also, *Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Commonwealth* v. *Wright*, 415 Pa. 55, 59 (1964).

DANIEL L. QUINLAN, JR.
Attorney for John Harry Bruno

COMMONWEALTH OF PENNSYLVANIA)
COUNTY OF MONTGOMERY) SS.

DANIEL L. QUINLAN, JR., ESQUIRE, being duly sworn according to law, deposees and says that he is the attorney of record for John Harry Bruno; that based upon the testimony presented by the Commonwealth in the Habeas Corpus proceeding of May 31, 1966 and in the hearing on the Application to Suppress Evidence which was held on June 1, 1966 and the preliminary statements of the District Attorney at the formal arraignment before the Grand Jury, deponent verily believes that the District Attorney necessarily "presented" the "statement" and "revolver", referred to in the foregoing Application, to the Grand Jury on June 3, 1966; and, deponent verily believes that the Commonwealth could not have obtained a "true bill" in any of the five murder indictments but for the introduction of the foregoing evidence, and that in view of the clear and explicit rulings of the Supreme Court of the United States (cited in Application), the indictments can not "stand" and should, therefore, be quashed.

/s/ DANIEL L. QUINLAN, JR.

Sworn to and subscribed before me this 6th day of June, A.D., 1966.

/s/ Barbara A. Wilhelm
Notary Public, Norristown, Montgomery Co., Pa.
My commission expires January 16, 1968

ORDER

AND NOW, this day of June, 1966, the Rule is granted as prayed for in the foregoing Application and hearing is set for the day of , at o'clock M., in Court Room " ", Court House, Norristown, Pennsylvania.

BY THE COURT:

_____ J.

IN THE CRIMINAL COURTS OF
MONTGOMERY COUNTY, PENNSYLVANIA

No. 279

APRIL TERM, 1966

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN HARRY BRUNO

COMMONWEALTH'S ANSWER TO DEFENDANT'S APPLICATION TO QUASH INDICTMENTS

The Commonwealth of Pennsylvania, by and through the District Attorney of Montgomery County, Richard S. Lowe, respectfully Answers the Defendant's Application to Quash Indictments as follows:

1. The Defendant's application assumes that the "statement" of April 27, 1966 was presented to the Grand Jury. The Commonwealth denies that the statement was presented to the Grand Jury, and, if the same be material, proof thereof is demanded at a hearing on the cause.

By way of further defense, the Commonwealth avers that the defendant waived any objection which he may have had to the statement itself or to any reference thereto by reason of a rather lengthy and prolonged dissertation which he made in the presence of the Grand Jury assembled before Judge Frederick B. Smillie in Court Room "C" at the Court House, Norristown, Pennsylvania at or about 9:30 A.M., Eastern Daylight Time, on Thursday, June 2, 1966.

A careful review of the testimony transcribed by the official court reporter makes it abundantly clear that defense counsel initiated the question of the statement and voluntarily raised the issue before the Grand Jury thereby waiving any objections he might have thereto.

The Commonwealth further contends that there is other judicial machinery available providing a remedy for any

alleged irregularity or defect in the criminal proceeding, and that such being the case the defendant does not have the lawful authority to challenge the regularity of the Grand Jury proceedings and a Motion or Application to Quash the Indictments must be dismissed.

A Motion or Application to Quash an Indictment will not lie in the case where there was some competent testimony presented to the Grand Jury, and even if the evidence presented to the Grand Jury is insufficient to make out a prima facie case it is not grounds to quash the indictment.

The defendant, before providing law enforcement authorities with a statement, was fully and fairly apprised of his right to counsel and of the fact that anything he said could and would be used against him, and notwithstanding these admonitions he elected, voluntarily, to provide a written statement.

2. The Commonwealth categorically and most emphatically denied that the .22 calibre J. C. Higgins snub nose revolver was seized as a result of information illegally elicited from the defendant during interrogation while the defendant was detained incommunicado. Contrariwise, the defendant provided absolutely no information of an incriminating nature during the course of his interrogation on Tuesday, April 26, 1966, which resulted in any means or manner, directly or indirectly, in the discovery of the weapon at approximately 1:10 P.M. on the following afternoon, April 27, 1966.

The Commonwealth denies that the defendant was held incommunicado and emphatically states that before interrogation was commenced on the afternoon of April 26, 1966, the defendant was informed in a most certain and definite fashion of his right to remain silent and that anything he said could be used against him. Furthermore, the defendant received this same admonition plus the additional advice that he had a right to counsel, which he refused, before the statement was taken from him on Wednesday afternoon, April 27, 1966. At no time did the defendant or any one on his behalf seek to communicate with any party or parties beyond those in his immediate presence and at no time did he ask to communicate to or

consult with counsel. The revolver in question was obtained pursuant to a valid search warrant issued by a justice of the peace of competent jurisdiction pursuant to a complaint for a search warrant setting forth the probable cause and acknowledged by that justice of the peace previous to the issuance of a search warrant.

NEW MATTER

By way of further Answer and defense, the Commonwealth of Pennsylvania respectfully submits the following:

3. Grounds 1 and 2 set forth in the Defendant's Application to Quash the Indictments represents nothing more than a re-statement of allegations which he has heretofore filed pursuant to Sections 323, 324 and 2001 of the Pennsylvania Rules of Criminal Procedure.

This matter received a full, fair and adequate hearing before the Honorable David E. Groshens when the defendant had the right of subpoena; right to cross-examine all Commonwealth witnesses, which was vigorously exercised; and when the precise and very issues here advanced were judicially determined by Judge Groshens. The Commonwealth submits that it should not be subjected to the harassment and interminable pleadings of defendant which do nothing more than repetitiously raise the same issues time and again.

RESPECTFULLY SUBMITTED,

/s/ Richard S. Lowe
RICHARD S. LOWE
District Attorney

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA)
COUNTY OF MONTGOMERY) S.S.

RICHARD S. LOWE, being duly sworn according to law deposes and says that the facts set forth in the foregoing Answer are true and correct to the best of his knowledge, information and belief.

/s/ Richard S. Lowe

Sworn and subscribed to before me, this 10th day of June, A.D., 1966.

/s/ Eloise G, Irwin
Notary Public, Norristown, Montgomery Co.
My commission expires October 31, 1966

IN THE COURT OF QUARTER SESSIONS OF MONTGOMERY COUNTY, PENNSYLVANIA

No. 279 April Term, 1966
and Criminal Actions Nos. 803-807

COMMONWEALTH

vs.

JOHN H. BRUNO

ORDER

AND NOW, February 27, 1967, after argument, defendant's application to quash indictments is dismissed.

BY THE COURT:

/s/ David E. Groshens
P.J.

IN THE CRIMINAL COURTS OF THE COUNTY OF MONTGOMERY PENNSYLVANIA

No. 279

APRIL TERM, 1966

COMMONWEALTH OF PENNSYLVANIA

vs.

JOHN HARRY BRUNO

ORDER SUR REPORT OF SANITY COMMISSION

AND NOW, this 12th day of June, 1967, the report of the Sanity Commission previously appointed by Order of this Court dated July 6, 1966, having been filed, and the Court having reviewed said report, as well as the transcript of the proceedings before it, under the provisions of Section 345 of Article III of the Act of June 12, 1951, as amended [50 P.S. 1225], the Court hereby concludes that the defendant, John Harry Bruno, is mentally ill, is of criminal tendency, requires care in a mental hospital, does not have sufficient present ability to consult with his counsel with a reasonable degree of rational understanding, and does not have a rational and factual understanding of the proceedings flowing from the criminal charges lodged against him; in accordance with the provisions of said Act, the Clerk of Courts is DIRECTED to serve a copy of this Order on counsel for the defendant, Daniel L. Quinlan, Jr., Esquire, and upon the defendant's nearest relatives, Mr. and Mrs. Charles Bruno, 655 East Marshall Street, Norristown, Pa.; the entry of an Order of commitment to a state hospital for patients with criminal tendencies is deferred until June 28, 1967, in order that, in the interim, a request may be made by and/or on behalf of the defendant for a hearing before the Court, if the defendant, his counsel, or his nearest relatives wish an opportunity to be heard, all of which is in accordance with the aforesaid Act.

BY THE COURT:

/s/ Robert W. Honeyman

IN THE CRIMINAL COURTS OF THE COUNTY OF MONTGOMERY PENNSYLVANIA

No. 279

APRIL TERM, 1966

COMMONWEALTH OF PENNSYLVANIA

vs.

JOHN HARRY BRUNO

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

67-8338

HABEAS CORPUS

COMMONWEALTH ex rel JOHN HARRY BRUNO

vs.

FRANCIS NAILON, Warden Montgomery County Prison

OPINION IN SUPPORT OF JUNE 30, 1967, ORDER SUR DEFENDANT'S EXCEPTIONS TO SANITY COMMISSION REPORT AND THE JUNE 12, 1967, ORDER OF THE COURT AND SUR COMMONWEALTH'S MOTION TO STRIKE DEFENDANT'S EXCEPTIONS

and

JULY 3, 1967, ORDER SUR PETITION FOR WRIT OF HABEAS CORPUS

Counsel for the above named defendant has filed an appeal to the Supreme Court of Pennsylvania from the order of this court dated June 30, 1967, which concluded that the defendant was mentally ill and of criminal tendency and directed that he be committed to Farview State Hospital. This proceeding has been pending in the courts since the defendant's arrest on April 26, 1966, on five charges of murder. By previous order of this court dated July 6, 1966, a Sanity Commission was appointed to inquire into the mental condition of the defendant. From that order, an appeal was filed in the Supreme Court of

Pennsylvania. In connection therewith this court wrote an opinion in support of that order which will be found at 87 Montg. L.R. 81 (1966) and the Supreme Court filed an opinion supporting an order quashing the appeal which will be found at 424 Pa. 96 (1967). Reference to both such opinions will obviate the necessity of reviewing the proceedings up to that point.

After the appeal was quashed, this court directed the Sanity Commission to proceed in accordance with the provisions of the Mental Health Act of 1951. The Commission convened, held hearings, and submitted its report to the court on June 8, 1967. By order dated June 12, 1967, the court concluded that John Harry Bruno was mentally ill, was of criminal tendency, required care in a mental hospital, did not have sufficient present ability to consult with his counsel with a reasonable degree of rational understanding, and did not have a rational and factual understanding of the proceedings flowing from the criminal charges lodged against him, but deferred an order of commitment to a mental hospital until after the defendant, his counsel, or any relatives of the defendant were afforded an opportunity to seek a hearing before the court. No request for a hearing was made and, therefore, by further order of the court dated June 30, 1967, the court directed the commitment of the defendant to Farview State Hospital. Also, in such order the court dismissed Exceptions to the Sanity Commission's Report that counsel for the defendant had filed because there is no provision in the law for the filing of same: *Commonwealth* vs. *Ballem*, 391 Pa. 626 (1958). This court has been advised by counsel for the defendant that he does not contend that there were any departures from the requisite procedures under the Mental Health Act of 1951.

A review of the record of the proceedings before the Sanity Commission and their report amply shows that their recommendations were well founded, and provide sound support for the conclusions reached by this court concerning the mental condition of the defendant. On the first appeal, Justice Roberts, in his dissenting opinion, expressed the view that the Mental Health and Mental Retardation Act of 1966 should apply to the instant case.

A review of the provisions of that Act shows that the procedures applicable to this case in the 1966 Act are not markedly different from the 1951 Act. At page 14 of the Sanity Commission's report, it states:

> "Although the petition was filed under the Mental Health Act of 1951, as amended, the Sanity Commission is of the opinion that the defendant is mentally disabled and suffering from a 'mental disability' as defined by the 'Mental Health Act and Mental Retardation Act of 1966' as well."

With this opinion the court also agrees.

The personnel of the Sanity Commission was selected with great care by the court and consisted of an exceedingly experienced and competent member of the Bar and two "Board certified" psychiatrists with unimpeachable credentials. Certainly their findings and conclusions were entitled to be given great weight. Since neither the defendant, nor anyone on his behalf, presented anything to the court to conflict therewith, this court was fully justified in following the recommendations of the Sanity Commission.

Apparently, the principal contention of counsel for the defendant is that the indefinite commitment of the defendant to a mental hospital results in a deprivation of his being afforded a speedy trial as well as other Constitutional guarantees afforded a defendant in our Criminal Courts. Undoubtedly this may be true if the conclusions of the court as to his mental condition are not well founded. However, if he is mentally ill, or mentally disabled, and is unable to confer with his counsel and to understand the nature of the charges against him, then to compel him to be tried on five murder indictments would deprive him of his constitutional right to a fair trial. See *Pate* vs. *Robinson*, 383 U.S. 375 (1966). When or if, in the future, the defendant becomes mentally competent, then he is entitled to both a speedy and a fair trial on all open bills of indictment pending against him. Until that time arrives, this court is powerless to do other than it has done. As Chief Justice Bell commented in a footnote to his opinion in the previous appeal herein:

". . . The petition of the District Attorney was in the interest of fairness, mercy and Justice for the accused."

By reason of the results of the proceedings pursuant to such petition, this court firmly believes that the commitment of the defendant to a mental hospital was in the interest of fairness, mercy and Justice to him. We see no reason to disturb the order of commitment unless the Supreme Court of Pennsylvania disagrees with our conclusions concerning the defendant's mental illness or mental disability.

After the proceedings were concluded in the Criminal Courts of this County concerning the inquiry into the mental condition of the defendant, his counsel filed a Petition for a Writ of Habeas Corpus in the Court of Common Pleas of this County contending that the defendant's commitment to a mental hospital constituted an illegal and unconstitutional deprivation of his liberty. This really constituted a collateral attack upon the June 30, 1967, order of the Criminal Court, which said order is appealable. Therefore, President Judge Groshens, by order dated July 3, 1967, dismissed the petition. Obviously, no useful purpose would have been served by granting a hearing thereon, since the opportunity for a hearing on the same issue was spurned by the defendant and his counsel in the proceedings under the Mental Health Act. Clearly, if the court properly and lawfully concluded that the defendant was suffering from mental illness, then his commitment to a mental hospital could not constitute an unlawful or unconstitutional restraint on his freedom, so long as he had the benefit of all the substantive and procedural safeguards that the law provides. This we believe he had.

BY THE COURT,

/s/ David E. Groshens
P.J.

/s/ Robert W. Honeyman
J.

Dated: December 28, 1967

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IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

No. 75 January Term 1968

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN HARRY BRUNO, APPELLANT

Appeal from the Order of the Court of Oyer and Terminer of Montgomery County to No. 279 April Term 1966
Entered: July 6, 1967

No. 76 January Term 1968

COMMONWEALTH OF PENNSYLVANIA EX REL.
JOHN HARRY BRUNO, APPELLANT

v.

FRANCIS NAILON, Warden, Montgomery County Prison

Appeal from the Order of the Court of Common Pleas of Montgomery County to No. 67-8338
Entered: July 6, 1967

OPINION

EAGEN, J. Filed: June 27, 1969

These appeals are from an order of the Court of Oyer and Terminer and General Jail Delivery of Montgomery County committing the appellant, John Harry Bruno, to Farview State Hospital and from an order of the Court of Common Pleas of Montgomery County dismissing appellant's petition for a writ of habeas corpus.

Bruno was arrested on April 26, 1966, and was arraigned the following day on five charges of murder. On May 4, 1966, a preliminary hearing was held at which

Bruno entered a plea of not guilty. On June 2, 1966, a grand jury indicted Bruno on five charges of murder.

Meanwhile, On May 13, 1966, the Montgomery County district attorney filed a petition for the appointment of a commission to inquire into Bruno's sanity. Bruno's counsel filed a motion to dismiss the petition. After argument, the court, on July 6, 1966, denied the motion to dismiss and entered an order appointing a sanity

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commission. An appeal to this Court followed and was quashed. *Commonwealth* v. *Bruno*, 424 Pa. 96, 225 A. 2d 241 (1967).

Thereafter the sanity commission held extensive hearings. On June 8, 1967, it submitted its report to the Court of Oyer and Terminer of Montgomery County. The report concludes that Bruno is mentally ill and incompetent to stand trial and that he has criminal tendencies.

On June 12, 1967, the court entered an order committing Bruno to Farview State Hospital, but deferred the execution of the order until June 28, 1967, so that Bruno, his counsel or relatives might request a hearing. Thereupon Bruno's attorney excepted to the sanity commission's report on the ground that the record does not support the commission's conclusions and contains hearsay evidence. On June 30, 1967, the Commonwealth's motion to strike the exceptions was sustained on the ground that *Commonwealth* v. *Ballem*, 391 Pa. 626, 139 A. 2d 534 (1958), disapproves the exception procedure. On the same day the court directed the commitment of Bruno pursuant to its order of June 12, 1967.

Thereafter, Bruno filed a petition for a writ of habeas corpus in the Court of Common Pleas of Montgomery County. The petition was dismissed without hearing on the ground that the commitment order was appealable and no useful purpose would be served by a hearing.

These appeals followed.

Appellant's statement of the first question presented to this Court is: "May a sanity commission be substituted for a jury trial?" He contends that: "The sub-

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stitution of a sanity commission [for a jury trial] violates appellant's constitutional right to a jury trial as guaranteed by the Sixth Amendment [to the United States Constitution] and [by] Article I, § 9 [and § 6] of the Pennsylvania Constitution."

To support his contention that a sanity commission has been "substituted" for a jury trial, appellant asserts that his commitment to an institution for the criminally insane is a "sentence" as severe as if he were convicted of the crime with which he is charged.

We cannot agree that a commitment to an institution for the criminally insane is tantamount to a prison sentence. Although Farview State Hospital certainly is not a model institution, see Note, 110 U. Pa. L. Rev. 78 (1961), we are not prepared to say that it is equivalent to a prison. Punitive confinement in a prison is not the same as custodial supervision in a hospital. Rehabilitative programs in a prison are not the same as psychiatric treatment in a hospital. In addition to the fact that the consequences of a commitment to a hospital are not the same as the consequences of a prison sentence, a proceeding determining competency to stand trial is not a "substitute" for a trial determining guilt or innocence of a criminal charge because the two proceedings clearly determine different issues.

Appellant cites *Pate* v. *Robinson*, 383 U.S. 375, 86 S. Ct. 836 (1966), apparently to support his contention that he is constitutionally entitled to a jury trial. *Pate* v. *Robinson*, however, held only that due process requires a *hearing* on the *competency of an accused to stand trial*

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when the circumstances at trial raised a doubt about his competency. Certainly the decision in *Pate* v. *Robinson* did not require a *trial* on the issue of the accused's guilt or innocence—the accused had already been tried and convicted. Neither did the decision in *Pate* v. *Robinson* require that a *jury* determine whether the accused was competent to stand trial. Although the opinion does note in passing that the law of the state which tried and

convicted the accused provides for a jury to determine the issue of competency to stand trial, there is no suggestion that due process requires a jury. All the authority which our research has uncovered indicates that the Sixth Amendment does not require that a jury determine the competency of the accused to stand trial. *United States* v. *Davis*, 365 F. 2d 251, 256 (6th Cir. 1966) and authorities cited therein. If the Sixth Amendment does not require a jury, certainly the due process clause of the Fourteenth Amendment does not require it. We have also determined that Pennsylvania Constitution, Article I, §§ 6 and 9, does not require a jury trial on this issue. *Commonwealth* v. *Bechtel*, 384 Pa. 184, 120 A. 2d 295 (1956).

Appellant also submits that his commitment to Farview State Hospital for an indefinite period violates his constitutional right to a "speedy trial."[1] All the author-

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ities our research has uncovered indicate that the federal constitutional guarantee of a speedy criminal trial does not require that an incompetent accused be tried. E.g., *United States Ex rel. Thomas* v. *Pate*, 351 F. 2d 910 (7th Cir. 1965), cert. denied 383 U.S. 962, 86 S. Ct. 1232 (1966); *Howard* v. *United States*, 261 F. 2d 729 (5th Cir. 1958); *United States* v. *Miller*, 131 F. Supp. 88 (D. Vt. 1955); *State* v. *Violett*, 111 N.W. 2d 598 (S.D. 1961). Appellant offers no argument which would lead us to interpret the state constitution differently.

[1] He does not argue that he should be given a jury trial before a determination on his competency even if the United States and Pennsylvania Constitutions do not so require. See generally, C. Foote, Pre-Trial Commitment of Criminal Defendants, 108 W. Pa. L. Rev. 832 (1960). Since the question has not been briefed or argued, we express no opinion on whether or not the institution of such a procedure would be desirable and consistent with the legislation controlling the determination of competency and within our power. But, it would appear to us that placing a man on trial while he was incompetent and mentally ill would be a violation of his constitutional right of due process. Certainly, the mental competence of an accused must be regarded as an absolute and basic condition of a fair trial.

Appellant's statement of the second question presented to this Court is: "May a sanity commission consider 'hearsay' confidential medical records and listen to testimony violative of *Miranda* v. *Arizona* (384 U.S. 436) and *Escobedo* v. *Illinois* (378 U.S. 478)?" He contends that: "The sanity commission's report should have been rejected" because of the alleged errors.

We cannot agree that the sanity commission's inquiry should be restricted as appellant contends.

We have repeatedly said that a sanity commission hearing is not criminal in character. It does not determine whether or not the accused shall be punished. It merely determines, as much for the benefit of the accused as for the benefit of the public, whether or not his mental condition is such that he shall not be tried; and its determination is solely to inform and advise the judge who himself decides whether or not the accused is competent to stand trial and, if he is not, whether or not he should be committed to a hospital pending his recovery. E.g., *Commonwealth* v. *Ballem*, supra; *Commonwealth* v. *Bechtel*, supra; *Commonwealth ex rel. Tate* v. *Shovlin*, 205 Pa. Superior Ct. 370, 208 A. 2d 924 (1965).

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Given the fact that the sanity commission hearing is not a criminal proceeding, we think that neither the hearsay rule, to the extent that it is mandated by the constitutional right to confrontation, nor *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966), are applicable.

Both the decision in *Miranda* v. *Arizona* and the right to confrontation derive from constitutional provisions which apply only to criminal proceedings. Thus the United States Constitution provides: "nor shall [any person] be compelled *in any criminal case* to be a witness against himself." Amend. 5 (Emphasis added.) "In all *criminal prosecutions* the accused shall enjoy the right . . . to be confronted with witnesses against him . . . and to have the assistance of counsel for his defense." Amend. 6 (Emphasis added.) Equivalent provisions of

the Pennsylvania Constitution also are limited to criminal prosecutions: "In all *criminal prosecutions* the accused hath a right to be heard by himself and his counsel . . . to meet the witnesses face to face . . . he cannot be compelled to give evidence against himself." Article I, § 9 (Emphasis added.)

Miranda v. *Arizona* extended the right against self-incrimination and the right to the assistance of counsel from the formal "criminal proceeding," i.e., the trial, to police interrogation. For similar reasons, we long ago indicated that the right against self-incrimination protects a person from being compelled to answer any question propounded to him by those making a mental examination "for the purpose of testifying in regard thereto" at a criminal trial. *Commonwealth* v. *Musto*, 348 Pa. 300, 306, 35 A. 2d 307, 311 (1944). Both *Miranda* and *Musto* simply recognize that the guilt determining process does not begin at trial. The same considerations, however, do not compel us to extend the boundaries of

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"criminal prosecutions" to include sanity commission hearings which focus on an issue other than the accused's guilt or innocence.

Of course, the constitutional rights which expressly exist in criminal proceedings may also be inherent in the constitutional provisions that "no person shall be deprived of life, liberty or property without due process of law," which obviously applies in non-criminal as well as in criminal proceedings. We do not believe, however, that due process requires the evidentiary restrictions advocated by the appellant. Such restrictions would unnecessarily impede a diagnosis of an accused's mental condition which would be a detriment to the accused as frequently as it would be a detriment to the prosecution. We believe that due process does not mandate these impediments when the purpose of the proceeding is to determine not whether to punish the accused by depriving him of liberty, but whether to help him by providing psychiatric treatment and custodial supervision

for his own protection, as well as for the protection of the public.

We consider only the issues raised by the appellant's statement of questions, briefed and argued before the Court. We express no opinion on any other issues which may be posed by the proceedings below.

Orders affirmed.

Mr. Chief Justice Bell, Mr. Justice Jones and Mr. Justice Pomeroy join in this opinion.

Mr. Justice Cohen filed a dissenting opinion

Mr. Justice O'Brien filed a dissenting opinion

Mr. Justice Roberts filed a dissenting opinion

Mr. Justice Pomeroy files a concurring opinion, in which Mr. Chief Justice Bell, Mr. Justice Jones, join.

[J. 195]

IN THE SUPREME COURT OF PENNSYLVANIA

Eastern District

No. 75 January Term 1968

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN HARRY BRUNO, APPELLANT

Appeal from the Order of the Court of Oyer and Terminer of Montgomery County to No. 279 April Term 1966
Entered: July 6, 1967

No. 76 January Term 1968

COMMONWEALTH OF PENNSYLVANIA EX REL.
JOHN HARRY BRUNO, APPELLANT

v.

FRANCIS NAILON, Warden, Montgomery County Prison

Appeal from the Order of the Court of Common Pleas of Montgomery County to No. 67-8338
Entered: July 6, 1967

CONCURRING OPINION

POMEROY, J. Filed: June 27, 1969

While I subscribe to the opinion of Mr. Justice Eagen, speaking for the Court, I feel constrained in light of the dissenting opinions, to mention additional considerations which have led me to this conclusion. The division of opinion relative to this appeal is not because of a conflict, or supposed conflict, between the rights of the accused on the one hand and the rights of society on the other, but because of disagreement concerning the interaction of two rights of the accused individual; the right to a fair trial, on the one hand, and the right to a speedy trial on the other, both of which are guaranteed by both the Federal Constitution and the Constitution of Pennsylvania.

In this case the Sanity Commission, duly established under the Mental Health Act of 1951, Act of June 12, 1951, P.L. 533, Art. III, § 327; as amended, 50 P.S. § 1202, and composed of two qualified psychiatrists and a competent lawyer, filed its report, consisting of 16 typewritten pages, concluding that the defendant is mentally ill as defined in the Mental Health Act, incompetent to stand trial, and of criminal tendency stemming from his mental illness. More specifically, the Commission was of the opinion that the defendant "is now and has been in the past suffering from chronic paranoid schizophrenia which has existed for a number of years", and that his criminal tendency stems from his mental illness, "as shown by his belief that only by eliminating suspected people can he and his family be protected. . . . [I]f no relief is forthcoming after the elimination of certain suspected persons he will have to seek other suspects." The report concluded with the finding that the defendant "does not have a sufficient present ability to consult with his counsel with a reasonable degree of rational understanding, nor does he have a rational and factual understanding of the proceedings flowing from the criminal charges lodged against him."

The findings of the Commission were adopted by the Court.

By the petition for a writ of habeas corpus, in which it is claimed that the order of commitment based on this report constitutes a violation of defendant's right to a jury trial and that he is being unconstitutionally deprived of his liberty, the lower court is asked, in effect, to ignore the report of the Commission and its own findings based thereon, revoke the commitment order, and proceed to the trial of the defendant for murder. One can imagine the charges of violation of due process that would be made if this petition were granted and a conviction resulted.

The appellant cites the statement of the Supreme Court of the United States in *Pate* v. *Robinson*, 383 U.S. 375, 15 L.Ed.2d 815 (1966) to the effect that Robinson was "constitutionally entitled to a hearing on the issue of his competency to stand trial." This is true, of course, and was adherred to in the present case. In the *Pate*

opinion, the Court further said, citing *Bishop* v. *United States*, 350 U.S. 961, 100 L.Ed. 835 (1956), "The State concedes that the conviction of an accused person while he is legally incompetent violates due process, and that state procedures must be adequate to protect this right."

The dissenting opinions, however, point out that in this case the defendant wants his trial and cannot be said to have waived it; the Sanity Commission was the State's doing, not his. If the Sanity Commission is correct in stating that the defendant is without ability to consult with his counsel with a reasonable degree of rational understanding, it is difficult to conclude that defendant can intelligently advise counsel with rational understanding that he desires to be tried. We note, in passing, that it was the lawyer and not the defendant who verified the petition for the writ of habeas corpus. There is a danger, it seems to me, of confusing zealous and able counsel with the client in a case of this sort.

It is said, again, that the incarceration in Farview Hospital is but a substitute for imprisonment following conviction, and might postpone appellant's trial indefinitely. This overlooks, it seems to me, two important points. The first, that the right to a speedy trial, like all other rights, is not absolute and automatic; it means speedy under the circumstances. As the Supreme Court of the United States has well stated, "The right of a speedy trial is necessarily relative. It is consistent with delays and depends on circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." Again, "Whether delay in completing a prosecution . . . amounts to an unconstitutional deprivation of rights depends upon the circumstances. . . . The delay must not be purposeful or oppressive." "[T]he essential ingredient is orderly expedition, and not mere speed:" *United States* v. *Ewell*, 383 U.S. 116, 120, 15 L.Ed.2d 627, 630 (1966), as quoted in *Hodges* v. *United States*, 408 F.2d 543, 549 (8th Cir. 1969).

The *Hodges* case involved a delay due to pre-trial commitment for determination of competency. The result of psychiatric examination was that the defendant was competent. Following the *Ewell* guidelines, the 8th

Circuit Court of Appeals, on appeal from a conviction of counterfeiting, held that the Sixth Amendment's guarantee of a speedy trial had not been violated. The Court paid particular attention to the first safeguard, "to prevent undue and oppressive incarceration prior to trial", and held that under the circumstances, the four months of incarceration involved in *Hodges* because of the incompetency issue was not "undue and oppressive". The Circuit Court singled out the third safeguard, viz., "to limit the possibilities that long delay will impair the ability of an accused to defend himself", as most important. This is properly of concern to the dissenting justices here, but of no less concern to the majority. In the second place, it is important to note that the Mental Health & Mental Retardation Act of 1966, Act of October 20, 1966. Spec. Sess. No. 3, P.L. ———, No. 6, art. IV, § 423, 50 P.S. Section 4423(7), provides a statutory procedure expressly designed to overcome this kind of delay.[1] This section provides that after the findings of the Sanity Commission, the committed person has the right to request that the Department of Public Welfare arrange for examination of his mental condition by a physician not associated with the Department. This request must be granted by the Department for the first time after six months' hospitalization, and can be demanded as often as once a year thereafter. Moreover, any committed person may petition for a writ of habeas corpus on the affidavit of a physician that in his opinion the person is no longer mentally disabled, or that his mental disability does not require care or treatment in a hospital facility, and in such proceeding the burden of proof rests upon the director responsible for the continued detention of the accused. *Ibid*, § 426, 50 P.S. § 4426(b)(2). Thus, in this case, Bruno has a readily available procedure, for he may, periodically and frequently, have a re-check of his mental competence to

[1] This Act became effective January 1, 1967, repealing all inconsistent provisions of The Mental Health Act of 1951. As of July 1, 1969, the latter Act was repealed absolutely. 50 P.S. 4701(a). Similar provisions as to release were contained in the Mental Health Act of 1951, as amended, supra. See *Com. ex rel. Wolenski* v. *Shovlin*, 419 Pa. 35, 213 A2d 327 (1965).

stand trial. He is not indefinitely confined without any recourse.

Mr. Justice Roberts notes, in his dissent, that under the Mental Health & Mental Retardation Act of 1966, a person in appellant's position must post bail if directed by the Court, in order to receive out-patient care, and argues that this fact labels the proceeding as criminal. There is no question, of course, that commitment under these circumstances is an adjunct to a criminal proceeding; therefore, the requirement that the accused post bail before being allowed to leave State custody is appropriate. He would have to do the same if there were no question about his mental competence and he wished to secure pre-trial freedom. Being out on bail, whether or not committed for incompetency, has no bearing on the issue of guilt.

It may well be that society has not yet reached the right answer in the handling of persons who are both criminally accused and found to be mentally incompetent, and to have criminal tendencies. Better methods may, and perhaps need to be, devised to accommodate the competing claims of fair trial and speedy trial in these situations. It does not follow, however, that a person in such an unfortunate position should be able to demand, on the one hand, a *speedy* trial and if his request is granted and conviction results, to charge, on the other hand, that he was denied a *fair* trial because he was tried when he was incompetent to defend himself. If there is to be fairness, there cannot be speed, in any absolute sense; if a trial is to be speedy, in an absolute sense, it will not be fair. The statutes of Pennsylvania, and the lower court in acting upon them, have endeavored to protect both rights of the defendant. This process, like any other, may be subject to abuse, but such abuse is not disclosed by the record before the Court in this case. The suggestions of malevolent motivation on the part of the Commonwealth are not justified.

Mr. Chief Justice Bell and Mr. Justice Jones join in this opinion.

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IN THE SUPREME COURT OF PENNSYLVANIA

Eastern District

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COMMONWEALTH OF PENNSYLVANIA EX REL. JOHN HARRY BRUNO, APPELLANT

v.

FRANCIS NAILON, Warden, Montgomery County Prison

Appeal from the Order of the Court of Common Pleas of Montgomery County to No. 67-8338

DISSENTING OPINION

COHEN, J. Filed: June 27, 1969

When an accused is adjudged incompetent a procedure should be established whereby the incompetent defendant might demand a speedy trial as required by both Federal and State Constitutions.

I recognize that this may require the appointment of a guardian to act on behalf of the incompetent defendant and the establishment of procedures so that the decision to stand trial can be made intelligently, either by the incompetent defendant or some one acting on his behalf. The Commonwealth, when properly requested, should not

be permitted to refuse to proceed with trial because of a defendant's incompetency and thereby deny defendant a right that is constitutionally guaranteed.

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Just as in *Kent* v. *United States*, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966), where it was indicated that the juvenile "receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children"; so, the incompetent receives neither the constitutional protections due him nor proper confinement. I would use this litigation as a vehicle to enunciate the constitutional rights of incompetent defendants.

I dissent.

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IN THE SUPREME COURT OF PENNSYLVANIA

Eastern District

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COMMONWEALTH OF PENNSYLVANIA EX REL. JOHN HARRY BRUNO, APPELLANT

v.

FRANCIS NAILON, Warden, Montgomery County Prison

Appeal from the Order of the Court of Common Pleas of Montgomery County to No. 67-8338
Entered: July 6, 1967

DISSENTING OPINION

ROBERTS, J. Filed: June 27, 1969

I am compelled to dissent from the majority's determination that evidence which would be inadmissible against appellant at a trial by virtue of *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966) and *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S.Ct. 1758 (1964) can nonetheless be used in a proceeding the result of which is to institutionalize appellant against his will because he is "incompetent to stand trial." I also believe that the Common-

wealth cannot force a competency hearing on an accused who wishes to go to trial.

Although in general a claim of incompetency to stand trial will come from an accused, here it must be remembered that appellant has continued to resist the Commonwealth's efforts to not try him. His psychiatric condition has been raised, not by him, but by the Commonwealth. Cf. *State* v. *Obstein*, Supreme Court of New Jersey, M-386, September Term 1967 (October 21, 1968). As a result, the Commonwealth now claims that it can use

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evidence to deprive appellant of his freedom through commitment that could not be used to deprive him of his liberty at a trial on the merits of the case. It should be quite clear then that the majority's statement that "the evidentiary restrictions advocated by the appellant . . . would unnecessarily impede a diagnosis . . . which would be of detriment to the accused as frequently as it would be a detriment to the prosecution" is illogical. Appellant here does not *want* an adjudication of his competency. If he did, he would suffer no detriment, for he would not raise any *Miranda* or *Escobedo* claims to prevent the use of evidence which *he* wanted to introduce and would not object to the Commonwealth's use of such evidence in the unlikely event that it was favorable to him.

In the main, the majority rejects appellant's claim because it finds that the competency hearing is not a "criminal proceeding." I would have thought that *Application of Gault*, 387 U.S. 1, 87 S.Ct. 1428 (1967) would have put to rest once and for all the simplistic notion that deprivation of constitutionality proscribed rights could be achieved by labelling, or rather mis-labelling, a proceeding as "non-criminal," but the majority here proves that the ghost still walks the land. In *Gault*, of course, the Supreme Court of the United States held that the characterization of juvenile proceedings as being aimed only at the child's best interests was insufficient to overcome the realities of the situation. An examination of the institution involved here reveals a striking similarity be-

tween it and the institution which *Gault* held could not be considered non-criminal for constitutional purposes.

The Court in *Gault*, quoting the dissenting opinion of Mr. Justice MUSMANNO in *Holmes Appeal*, 379 Pa. 599, 616, 109 A.2d 523, 530 (1954), stated that the juvenile is placed in "a building with whitewashed walls, regimented routine and institutional hours. . . ." 387 U.S. at 27, 87 S.Ct. at 1443. We need not argue with the majority's determination that Farview, where appellant was sent, is not "equivalent to a prison" to find that it is close enough to be as objectionable as the institutions involved in *Gault* and Holmes. Staff members at Farview not only have recognized that "bars, guards, and

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routine" are a significant part of the atmosphere of the institution; they have claimed that these factors are helpful in rehabilitation! 110 U. Pa. L. Rev. 78, 86 (1961).

The Supreme Court in *Gault* did not require as does the majority here that the institution to which juveniles were sent be "tantamount to a prison sentence." It was sufficient that the institution had the characteristics that are present at Farview. Once this was the case, constitutional guarantees attached just at if there had been the usual trial.

Even apart from *Gault*, it is sheer fantasy to suggest that appellant is not now locked in Farview as a result of a criminal proceeding. Appellant was charged with and indicted for crimes. He was before the court which instituted competency proceedings as a direct result of those charges. Obviously competency to stand trial is not at issue unless there is contemplated a trial for which the accused may have to stand.

The fact of the crime and the type of crime is relevant to the way appellant may be handled once institutionalized. For example, one study of Farview indicates that "public fear and outrage" resulting from "atrocious acts" influences the hospital staff, perhaps creating "more stringent release standards to certain patients, in order to satisfy public vengeance . . ..." 110 U. Pa. L. Rev. 78, 94 (1961). Furthermore, the time which an individ-

ual spends in Farview will be thought of as "punishment" and frequently neither prosecuting authorities nor the public will press for further incarceration if the accused is released. *Id.* at 104.

The fact that appellant has been deprived of his liberty and incarcerated as a result of a competency hearing which is an adjunct of a criminal proceeding causes him to be treated differently than civil committees under the Commonwealth's mental health statutes. Under prior law, civil committees were allowed to readjust to the outside world through pre-release trial visits, but this procedure was not available to the "criminally insane" at Farview. *Id.* at 86. Under the Mental Health and Mental Retardation Act of 1966 the distinction is even more striking. [195-4]

A person, like appellant here, who is charged with a crime, detained in a penal institution and then committed can receive outpatient care under "conditions as the court [to whom application for the treatment is made], may direct, including *the entry of bail. . . .*" Act of October 20, 1966, P.L. 6, § 408, 50 P.S. § 4408 (Emphasis added.). In contrast, under § 4406, there is no provision for court imposed conditions or the imposition of bail where persons under civil commitment are concerned. To conclude that a hearing which results in a situation where an individual cannot receive certain mental treatment without posting bail is not a "criminal" proceeding is completely unrealistic.

It is perfectly clear that appellant is being sent to an institution that has the trappings of a prison. The time he spends there, his potential for release, and the possibility of further incarceration are all influenced by the widely held opinion that his tenure in the institution is at least to some extent "punishment." To receive outpatient care, he may have to post bail, a procedure unique to the criminal process. And he has been committed under a procedure *which applies only to those who are in the criminal process because they are charged with a crime.* I believe that appellant's competency hearing was indeed part of a "criminal proceeding" and as a result he was

entitled to the constitutional protections and evidentiary rules established in *Miranda* and *Escobedo*.

Turning to appellant's next claim, while I am not prepared to go as far as Mr. Justice O'BRIEN, who believes that it is violative of due process to require an accused to choose between competency proceedings and a trial, I nonetheless do not believe that the Commonwealth may do what it has done in this case by imposing competency proceedings on appellant against his will. It must be remembered that this is not the usual case, where an accused himself raises his own incompetency, in an attempt to postpone or eliminate his trial. Here appellant has requested a trial, but the Commonwealth has forced the competency proceeding on him.

[195-5]

Certainly there is considerable substance in the fear that a prisoner may be greatly prejudiced by the trial delay engendered by his institutionalization. This danger is of course one of the main thrusts of the sixth amendment's speedy trial requirement. Furthermore, the accused must live under the threat of the indictment that continues to hang over him. As justification for this, the Commonwealth argues in effect that the competency proceeding is in appellant's own best interests.

This claim, I believe, misses the point of the competency hearing. In practically all cases, a competency hearing will be used to test the validity of an accused's claim that he should not stand trial. It is a sanity hearing, and cannot completely answer the question of the extent to which an accused is capable of proceeding with his case. "... [A] claim of trial incapacity brings into question the ability of the accused to consult effectively with his lawyer and to supply him with information relevant to the matter charged and his involvement, if any, in it. *Dusky* v. *United States*, 1960, 362 U.S. 402." *United States ex rel. Roberts* v. *Yeager*, No. 17139 (3d Cir. November 4, 1968).

Here however the determination that appellant *could* stand trial has been made by his own attorney who has spent considerable time with appellant preparing a case.

I agree with Mr. Justice O'BRIEN's conclusion that whatever infirmity from which a defendant may suffer does not also affect his counsel, and that where there is a competency question, the court can always appoint an amicus counsel to protect a defendant who refuses an attorney. I would much prefer that an accused be protected by the opinion of his own attorney, or one appointed to protect him, than by the rather surprising solicitude of the prosecution in this case. Allowing the prosecution to raise appellant's competency to deprive appellant of his right to an immediate trial places the Commonwealth in the position of being an advocate, opposed to appellant, who can affect appellant's trial position by masquerading as appellant's benefactor.

[195-6]

The prosecution's actions here raise, in my opinion, a general due process problem, in addition to the speedy trial violation. The prosecution has taken a position contrary to the position it would normally be expected to take. Having charged appellant with a crime, it is now in effect telling him how to conduct his defense while continuing to act as advocate for the Commonwealth. Once appellant has been charged with a crime, it is no longer the Commonwealth's concern how he conducts his trial, cf. *State* v. *Obstein*, supra; it is grossly unfair for the Commonwealth to skewer appellant on the point of one of his own potentially available defenses, and in my view this cannot be permitted under our theories of due process.

It is no answer that appellant may be dangerous to society should he be acquitted and not institutionalized. There is still ample opportunity to have appellant civilly committed. See 50 P.S. § 4406 (commitment proceeding can be brought by "any responsible person," as well as by certain government agencies). Under those circumstances he would not be committed subject to the criminal commitment limitations and restrictions discussed earlier. This is exactly to what appellant should be entitled if he goes to trial and is not convicted. (If appellant is acquitted by reason of insanity, the new Mental Health Act

dictates that this commitment, if any, be under the civil commitment procedures of § 4406, 50 P.S. § 4413.) I do not believe that an accused should be stigmatized as a criminal and subjected to procedures for treating the criminally insane when he, on advice of *his own* counsel, would be willing to proceed to trial despite any infirmity from which he may be suffering. It is not for the Commonwealth to interfere with his desires as to the conduct of his legal affairs.

Accordingly I dissent from the majority's determination. Since I believe that the competency hearing was impermissible when appellant wished to go to trial, I would vacate and remand for trial on the merits of the alleged offenses. And even were the competency hearing permissible under these circumstances, I believe that its determination here was invalid if it utilized evidence in violation of *Miranda* and *Escobedo*.

(J195)

IN THE SUPREME COURT OF PENNSYLVANIA

Eastern District

No. 75 January Term 1968

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN HARRY BRUNO, APPELLANT

Appeal from the Order of the Court of Oyer and Terminer of Montgomery County to No. 279 April Term 1966

and

No. 76 January Term 1968

COMMONWEALTH OF PENNSYLVANIA EX REL. JOHN HARRY BRUNO, APPELLANT

v.

FRANCIS NAILON, Warden, Montgomery County Prison

Appeal from the Order of the Court of Common Pleas of Montgomery County to No. 67-8338

DISSENTING OPINION

O'BRIEN, J. Filed: June 27, 1969

The majority opinion represents a resolution of the instant case that is abhorrent to fundamental notions of due process. Although at all times strenuously maintaining his innocence, appellant has been incarcerated in Farview State Hospital, an institutional for the criminally insane, without being tried and convicted of a crime. Delineation of the institution as a hospital does nothing to remove the stigma of its housing only the "criminally insane", nor does it insure that the adequate treatment is taking place which alone can transform a Hades of pun-

ishment into a haven for the sick.[1] In fact, it appears that it is a rare "patient" at Farview who receives the treatment he needs. One thoroughgoing study of that institution concludes, "It is difficult to deny that the type of psychiatric treatment available at Farview State Hospital, as well as that actually given, is inadequate. Patients at Farview are fed, clothed, cared for, and amused; but few of them are treated."[2]

J195 (2)

Yet, even if appellant were not tainted by his confinement in an institution for the *criminally* insane, even if he were being given the best possible treatment in an actual hospital, he would still be denied the due process of law guaranteed by the Constitutions of this nation and this Commonwealth. The guarantee of a speedy trial was inserted into our Constitutions[3] both to afford an accused the opportunity to remove the cloud cast upon his name by an accusation, and also to prevent the loss of potentially exculpatory evidence. Both of these reasons apply to the case at bar.

Without any attempt to reason from the principles inherent in a right to a speedy trial, the majority simply asserts that the guarantee of a speedy trial does not require that an incompetent accused be tried, citing in this case of first impression in Pennsylvania four cases (only

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[1] See generally, Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960). See also *Rouse* v. *Cameron*, 373 F.2d 451, (D.C. 1967); *Darnell* v. *Cameron*, 348 F.2d 64 (D.C. Cir. 1965); *Miller* v. *Overholner*, 206 F.2d 415 (D.C. Cir. 1953), where the court ordered a civilly committed sexual psychopath removed from a hospital ward for the criminally insane because the ward was a place of punishment rather than of treatment.

In *In the Matter of Ardry Jones*, —— Pa. ——, —— A.2d —— (1968), we held that treatment was not essential because Jones was incarcerated in a penal institution. Where, as here, appellant was confined in a hospital, treatment is certainly required.

[2] Note; *Hospitalization of Mentally Ill Criminals*, 110 U. Pa. L. Rev. 78, 107 (1961).

[3] Article 1, § 9 of the Pennsylvania Constitution, and the Sixth Amendment to the United States Constitution, where federal trials are involved.

one appellate case) interpreting the federal guarantee. Although I agree with the majority that the guarantees in the federal and state constitutions are the same, I see no reason to accept blindly the language of the cases cited by the majority. In none of these cases does it appear that the instant factual situation was thoroughly considered. *Howard* v. *U.S.*, 261 F.2d 729 (5th Cir. 1958) was a two-paragraph *per curiam* opinion. It relied solely upon the fact that the constitutionality of the federal statute, 18 U.S.C.A. §§ 4244-4248, providing for the commitment of those found to be incompetent to stand trial and dangerous, had been upheld in *Greenwood* v. *United States*, 350 U.S. 366, 76 S. Ct. 410 (1956). Yet the issue of the denial of a right to a speedy trial was never

J195 (3)

raised nor decided in *Greenwood*. The issue was solely a jurisdictional one—whether the application of the statute to defendants who were "permanently" insane or unlikely to recover was an unconstitutional exercise of federal power, the federal government being without the *parens patriae* power over the insane that the states have. The Court in *Greenwood*, unable to conclude from the psychiatric evidence that Greenwood's insanity was permanent, grounded the federal commitment on the federal authority to prosecute for federal crimes. Nowhere was the speedy trial problem considered. Similarly, the court in *United States* v. *Miller*, 131 F. Supp. 88 (D. Vt. 1955) also cited by the majority, based its decision largely on the fact that two United States Courts of Appeals had upheld the constitutionality of the federal statute.[4] Once again, however, the attacks on the statute were not on the basis of a denial of a speedy trial, but rather on the jurisdictional question which *Greenwood* eventually resolved.

In *State* v. *Violett*, 111 N.W. 2d 598 (S.D. 1961), a third case relied upon by the majority, the main basis for the decision was that the defendant had waived his right to a speedy trial by not asking for it and acquiescing in the incompetency proceeding. By contrast, in the instant

[4] *Wells* v. *Attorney General*, 201 F.2d 556 (10th Cir. 1953); *Higgins* v. *United States*, 205 F.2d 650 (9th Cir. 1953).

case, appellant objected to the appointment of a sanity commission and has at all times desired to be tried. The waiver theory also appears to be the basis of the final case cited by the majority, *United States ex rel. Thomas* v. *Pate*, 351 F.2d 910 (7th Cir. 1965), cert. denied 383 U.S. 962, 86 S. Ct. 1232 (1966).[5]

The above should not be considered any sort of an endorsement of the waiver theory. On the contrary, I believe that any procedure which requires a defendant,

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(or more likely, his counsel), to choose between incompetency proceedings and a trial violates due process.[6] Here, however, appellant did not elect an incompetency proceeding and then seek release for violation of his right to a speedy trial. Nor did he even acquiesce in the incompetency proceeding brought by the District Attorney. Appellant has maintained his innocence throughout and has at all times pressed for a trial. It is no answer to say, as the court did in *United States* v. *Miller*, supra, that where a defendant does not have the mental capacity properly to assist in his own defense, *a fortiori* he does not have the capacity to decide that he wants to stand trial.[7] Such a view ignores several factors. First, al-

[5] Actually, the statement that there was no violation of the consitutional right to a speedy trial was at most an alternative holding. The court held that the grounds advanced has been advanced in a prior petition that had been decided on the merits, and thus could not be considered. Nonetheless, it then went on and did consider the speedy trial issue in one brief paragraph. The only citation was to *Germany* v. *Hudspeth*, 209 F.2d 15, 19, (10th Cir. 1954), cert. denied 347 U.S. 946, 74 S. Ct. 644 (1954), the clearest possible case of waiver, where defendant himself initiated the incompetency proceedings.

[6] See the very excellent Comment by Caleb Foote, *Pre-Trial Commitment of Criminal Defendants*, 108 U. Pa. L. Rev. 832, 845-6 (1960).

[7] In *Pate* v. *Robinson*, 383 U.S. 381, 384, 86 S. Ct. 836 (1966), the Court stated: ". . . [I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly and intelligently 'waive' his right to have the court determine his capacity to stand trial." I read this not as support for the *Miller* view that an incompetent defendant can never go to trial, but as merely saying that his going to trial does not preclude his later raising the incompetency issue.

though a defendant who is incompetent to stand trial may not be able to determine wherein lies his best course, his counsel does not suffer the same infirmity. And if the defendant refuses counsel, the court can appoint an *amicus curiae* to represent the defendant's interests.[8] Secondly, such a view presumes that it is always in the best interests of the defendant[9] that he be committed if men-

J195 (5)

tally incompetent.[10] Of course this is not true, nor would it be even if defendant were guilty of the crime charged. The choice between a prison term and a possibly lifelong stay in an institution for the criminally insane is by no means always resolved in favor of the latter.[11]

Most importantly, the *Miller* view works a grave injustice in those instances where the defendant is not guilty of the crime charged. He is sent to an institution for the criminally insane, he has the sword of indictment hanging over his head the entire time, and the means of proving his innocence may be irretrievably lost. Prosecu-

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[8] This suggestion was made in *Seidner* v. *United States*, 260 F.2d 732 (D.C. Cir. 1958), where the court anticipated that the defendant would refuse counsel on remand. See also *Foote, Pre-Trial Commitment*, supra, at page 845; Note, *Incompetency to Stand Trial*, 81 Harv. L. Rev. 454, 467 (1967).

[9] The commitment of all defendants incompetent to stand trial is not necessarily in society's interests either, even if society should be permitted to work its will at the expense of trampling upon the rights of this unfortunate minority. The statute under which appellant was committed, the Act of June 12, 1951, P.L. 533, Art III, §§ 344, 345, 50 P.S. §§ 1224, 1225, as well as another parallel section of the same Act, 50 P.S. § 1222, requires no showing of dangerousness as a prerequisite for commitment. It is enough that the defendant be "mentally ill or in such condition that he requires care in a mental hospital." Sending non-dangerous persons to institutions for the criminally insane hardly rebounds to society's benefit.

[10] The *Miller* Court stated, 131 F.2d at 94-95: "The sound basic policy of Sections 4245 and 4246 of the United States Code is to protect people from facing charges against them when they are not mentally present."

[11] See authorities cited in Note, *Incompetency to Stand Trial*, supra, at n.16.

tion evidence may also be lost, but this is considerably less likely, for the prosecution is much more likely to have facilities for gathering and preserving evidence than is a committed person. In any event, the fact that the prosecution may in some cases be prejudiced in no way assures each particular defendant against prejudice. Certainly cases exist where an incompetent defendant, despite his incompeptence, would not be convicted. One of the most flagrant examples is *United States* v. *Barnes*, 175 F. Supp. 60 (S.D. Cal. 1959). The facts in that case were summarized in Foote, *Pre-Trial Commitment*, supra, at page 832:

"In 1949 four military prisoners killed a fellow prisoner in a California disciplinary barracks and were convicted of murder by a military court martial. Ten years later the Supreme Court sustained the defendants' contention under section 92 of the Articles of War that the military court had had no jurisdiction over a case of murder committed within the continental United States in time of peace. [footnote omitted] Thereafter on March 4, 1959, defendants were indicted in the civil federal district court. As to three of the defendants, the court, relying principally upon United States v. Provoo, 17 F.R.D. 183 (D. Md.), aff'd per curiam, 350 U.S. 857 (1955),

J195 (6)

granted a motion to dismiss on the ground that the ten-year delay, occasioned not through the fault of the defendants but as a result of a calculated tactical gambit by the government, had amounted to denial of the right to a speedy trial. However, the indictment against the fourth defendant, Coons, was not dismissed; he was recommitted to the custody of the Attorney General. Coons had been brought to court from Springfield, Missouri, where he had been serving his military life sentence in the federal institution for the criminally insane. This fact together with his conduct in court caused the judge to order a psychiatric examination pursuant to the 1949 federal statute governing determination of mental competence to stand trial. [footnote omitted] After examination and hearing, Coons was found to be 'presently in-

sane and so mentally incompetent as to be unable to understand the proceedings against him,' and he was returned to Springfield until, presumably, he should be sufficiently recovered to 'participate' in the dismissal of the indictment against him." Here is a man, obviously not convictable, who, as Foote laments, is forced to submit to a commitment procedure which is part of the criminal process and which will result in confinement with the criminally insane. No finding of dangerousness was made in *Barnes*, nor, as pointed out above, in footnote 9, is such a finding required in Pennsylvania. There are even worse cases than this. Barnes' defense was based solely on a point of law; if he ever recovered his sanity, he would be freed if tried. But what of the defendant who has an affirmative defense that depends on witnesses who may not be available or who may not remember when he is finally tried?

Such a pre-trial commitment procedure poses grave danger of furthering what our entire system of constitutional safeguards seeks to prevent—the loss of freedom of an innocent, non-dangerous person. This machinery, in the hands of the most conscientious public official, which we have every right to assume the Montgomery County District Attorney is, casts doubt upon the efficacy of our judicial system. In the hands of the unscrupulous, this

procedure could prove to be a terrible instrument for tyranny. It is one of the glories of our system of government that our institutions are greater than the men who run them. We should strive to keep it that way, so that our well-being need not hinge upon the beneficence of those we choose to serve us. We must always remain "*non sub homine, sed sub deo et lege.*"

Finally, the view that says that an incompetent defendant cannot choose whether to stand trial or not is defective in assuming that by going to trial, a defendant would forego any opportunity to challenge his competency to stand trial. At least one common law court has held that the determination of the defendant's competency must be deferred until after the trial on the merits, where

the defense wishes to go to trial on the merits.[12] In *Regina* v. *Roberts*, [1953] 2 All E. R. 340 [1954] 2 Q.B. 329, the court, Devlin J., postponed swearing a jury to try the preliminary issue of competency to stand trial (fitness to plead) until the merits were tried. Devlin, J.

J195 (8)

cogently stated: "Counsel for the defense cannot be forced to accept [an institution for the criminally insane] for his client, if on a true view of the facts, he is of the opinion that he can properly obtain for his client a verdict of not guilty. Nor can he be forced to elect. He must be entitled to retain his rights to say that the accused is not in a position to instruct him and therefore he cannot put the accused in the witness-box to tell his own story. He cannot be forced to say to himself: 'Shall I play for safety and obtain a verdict whereby this man is detained as a criminal lunatic, or shall I, in effect, gamble on the chance of my being able to get him off altogether with the knowledge that if my gamble fails he will be convicted of murder.' . . . There must, in my view, be a procedure which would enable counsel for the defense to have the advantage of taking both points, and

[12] Of course, where the competency issue may be deferred until after a trial on the merits, there would be little to restrain a defendant from always seeking a trial on the merits. It is doubtful that this would add much burden to the judicial system, by requiring some trials in which a guilty verdict would be of no effect. Although statistics are sketchy, it appears that cases where defendants are held incompetent to stand trial are rare, and in many of those defendant's insanity at the time he committed the crime would be a defense on the merits.

Counterbalancing any added burden would be the probable aid to the determination of competency from the evidence of the defendant's actual conduct at trial. See *Pouncey* v. *United States*, 349 F.2d 699 (D.C. Cir. 1965) and Note, *Incompetency to Stand Trial*, supra, at page 469, the competency hearing should follow closely upon the heels of the trial court, and could include reports of pretrial psychiatric examinations of the defendant in order to avoid the problems of an inquiry into a defendant's mental condition in the distant past, as illustrated by *Dusky* v. *United States*, 362 U.S. 402, 80 S.Ct. 788 (1962).

In any event, the question of added burden on the courts is irrelevant to a decision based on a denial of due process.

if there were no such procedure I think it would be necessary to invent it, because to insist on the issue of fitness to plead being tried [first] might result in the grave injustice of detaining as a criminal lunatic a man who was quite innocent; indeed, it might result in the public mischief that a person so detained would be assumed, in the eyes of the police and of the authorities, to have been the person responsible for the crime—whether he was or was not—an investigations which might have led to the apprehension of the true criminal would not take place."[13]

I would allow the appellant his constitutional right to a speedy trial.

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[13] [1954] 2 Q.B. 329, 332-33.

When the same issue later arose before a different judge, Byrne, J. on the Queens Bench, he refused to allow a trial on the merits, *R. V. Beynon*, [1957] 2 All E.R. 513 (Cardiff Ass.), merely relying on a long line of authority to the effect that an insane man, who cannot defend himself, should not be forced to trial. Of course, as the commentators indicate, this misses the point. See Foote, *Pre-Trial Commitment*, supra, and Note, *Incompetency to Stand Trial*, supra.

SUPREME COURT OF THE UNITED STATES

No. 780 Misc., October Term, 1969

JOHN HARRY BRUNO, PETITIONER

v.

PENNSYLVANIA

On petition for writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania, Eastern District.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1634 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 1, 1970

Mr. Justice Marshall took no part in the consideration or decision of this motion and petition.

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